(15,841.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 248.

THE CENTRAL NATIONAL BANK OF BOSTON ET AL., PLAINTIFFS IN ERROR,

vs.

AARON R. STEVENS ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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a STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE, ALBANY, —— —, 187–.

The return of the judges of the court of appeals of the State of New York, in pursuance to the writ of error in the case of Aaron R. Stevens & o'rs *vs.* The Central National Bank of Boston & o'rs, is contained in the papers and proceedings hereto attached.

Seal State of New York Court of Appeals.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this ninth day of March, A. D. 1895.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

b In the Court of Appeals of the State of New York.

AARON R. STEVENS and Others, Respondents,
against
THE CENTRAL NATIONAL BANK OF BOSTON AND OTHER CERTIFICATE-HOLDERS, Impleaded with Others, Appellants.

Return.

Campbell & Paige, attorneys for respondents.
Hale & Bulkeley, attorneys for Central National Bank of Boston and others, appellants.

1 Supreme Court.

Trial desired in the county of Rensselaer.

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. Wilbur, Andrew A. Douglas, as Trustee under the Last Will & Testament of William Henry Douglas, Deceased, & Ida S. Harrison, Plaintiffs,

against

THE UNION TRUST COMPANY OF NEW YORK, JAMES C. Hull, William Butler Duncan, John G. McCullough, as Administrator of the Goods, Chattels, and Credits of Trenor W. Park, Deceased; The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as Receiver of the Property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The Central National Bank of Boston, Peter Butler, as Receiver of the Property of the Pacific National Bank of Boston; The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alysstine, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing, John A. Nichols, Henry A. Tweed, as Surviving Trustees of the Creditors and Stockholders of the New York Loan and Indemnity Company; Royal E. Robbins, Barthold Schelinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndike, William P. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting and Eustace C. Fitz, and William D. Shipman, as Assignee of William Butler Duncan, Defendants.

Fifth Amended Summons.

2 To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or an-

swer judgment will be taken against you by default for the relief demanded in the complaint.

Dated December 8th, 1890.

CAMPBELL & PAIGE,
Plaintiffs' Attorneys.

Office and post-office address, No. 102 Broadway, New York city, N. Y.

3 Supreme Court.

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Fifth Amended Complaint.

4 Plaintiff- bringing this action in behalf, as well of all other

owners and holders of bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and hereinafter described, who may come into the same, as of themselves, shows to the court, upon information and belief:

1. That the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation, under and by virtue of the laws of the State of New York, by the filing of its articles of incorporation or association on the twenty-fifth day of March, one thousand eight hundred and fifty-two, and by the provisions of the following acts of the legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont, and to provide means therefor," passed March 8th, 1853, and being chapter 25 — the laws of that year;

"An act to amend an act entitled 'An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont, and to provide means therefor, passed March 8th, 1853,'" passed June 24th, 1853, and being chapter 461 of the laws of that year;

"An act to enable certain connecting railroad companies to aid in the construction of the Lebanon Springs railroad," passed April 12th, 1855, and being chapter 350 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed March 23d, 1857, and being chapter 150 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed April 12th, 1860, and being chapter 285 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed April 22d, 1862, and being chapter 444 of the laws of that year;

"An act to amend the charter of the Lebanon Springs Railroad Company," passed April 9th, 1864, and being chapter 145 of the laws of that year;

"An act to authorize any town in the counties of Columbia or Rensselaer to aid in the completion of the Lebanon Springs railroad," passed April 4th, 1866, and being chapter 373 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed 26th February, 1867, and being chapter 46 of the laws of that year.

And by virtue of the same it became vested with all the powers and franchises of corporations stated in the Revised Statutes of New York, and of railroad corporations stated in "An act to authorize the formation of railroad corporations, and to regulate the same," passed by the legislature of New York, April 2d, 1850, and the several acts amendatory thereof, and supplementary thereto, and with power to purchase, construct and operate during the period of its corporate existence, and of any extensions or renewals thereof,

the railroad hereinafter described, extending from Chatham Four Corners, in the county of Columbia, northerly through the counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also with the certain other special and particular powers and franchises stated in the above acts, and also the following powers and franchises, to wit:

6 To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the managing of the business thereof, which it might do if that part were within the State of New York.

To create preferred stock at such rate of dividend, or interest, and with such securities therefor, as it might deem expedient.

To extend its road by construction or purchase, into the States of Vermont and Massachusetts, as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate, either itself alone or after consolidation with any other company into a single corporation, with any company having a railroad, or the right to construct a railroad which, or a portion of which should be within the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in an act entitled "An act to authorize the consolidation of certain railroad companies," passed by the legislature of New York, April 2d, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which it might construct or acquire within the States of Vermont and Massachusetts, as it might exercise if the same were wholly within the State of New York.

To have its stock and bonds taken and owned or guaranteed by any company having or being authorized to construct a railroad connecting with the line of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by

7 loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of its railroad from the Massachusetts State line as declared in its articles of association to any point within the town of Hoosick, in the county of Rensselaer, or the town of White Creek, in the county of Washington.

To construct a branch to a terminus at the Vermont State line, at a point of junction with the Western Vermont railroad, now known as the Bennington and Rutland railway.

To construct a branch with a terminus in either or both of the

cities of Albany and Troy, with the same effects as if the line of the said company had been originally fixed in its articles of association both as to its main line and branches as the same are last above described, and the termini thereof had been its original terminus.

That by virtue of the following acts which were duly passed by the legislature of the State of Vermont, to wit:

"An act to incorporate the Vermont and New York Railroad Company," approved November 2d, 1865, and being No. 134 of the laws of that year;

"An act to amend an act entitled 'An act to incorporate the Vermont and New York railroad,' approved November 2d, 1865," approved November 19th, 1866, and being No. 167 of the laws of that year;

"An act authorizing the Bennington and Rutland Railroad Company to consolidate their road with the road of the Lebanon Springs Railroad Company," approved November 21st, 1867, and being No. 155 of the laws of that year;

"An act to enable the Bennington and Rutland Railroad Company to aid in obtaining necessary railroad connections," approved March 28th, 1867, and being No. 2 of the special session laws of that year, the Vermont and New York Railroad Company
8 was incorporated with the powers and franchise- of railroad corporations under the laws of Vermont, and to build, own and operate a railroad from Bennington to the Vermont State line, being that portion of the railroad hereinafter described which is within the State of Vermont, and to transfer and convey such powers and franchises and any property to the said Lebanon Springs Railroad Company, and to consolidate by a vote of a majority of its stockholders, with the Lebanon Springs Railroad Company.

That said company was duly organized and its road duly located and the construction thereof commenced.

That afterwards on or about the twentieth day of Aug., 1867, the Vermont and New York Railroad Company by its deed of conveyance of that date in all respects duly authorized, executed, acknowledged and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebanon Springs Railroad Company the said Vermont and New York railroad so located as aforesaid, with all its privileges and appurtenances and all the rights and franchises of said Vermont and New York Railroad Company.

The Lebanon Springs Railroad Company constructed the said railroad from Chatham to Bennington, hereinafter described, including the completion of the Vermont and New York railroad, and completed the same and opened it to the public early in the year 1869, and, except as otherwise hereinafter alleged, has always and ever since operated the same as a railroad.

And it also became possessed and the owner of the following-described property, to wit: All and singular the track or roadway of the Lebanon Springs railroad, from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York,

in the town of Hoosick, in the county of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said The
9 Lebanon Springs Railroad Company already built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same and of any and all of the above-mentioned powers and franchises; and also all the rolling stock, locomotives, tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York railroad constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid to the village of Bennington, in the State of Vermont, including all the equipment and all the above-mentioned powers and franchises of the said The Vermont and New York Railroad Company belonging to or in anywise appertaining to, or which may at any time belong or appertain or have belonged or appertained to the same or either of said railroads or companies as well in law as in equity; including also all property of every kind, name or nature of or purchased by or in the possession of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company and John W. Van Valkenburg as receiver; and including also all property, powers and franchises of every name or nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867.

That none of the above-mentioned rights, powers and franchises have elapsed, been lost, forfeited or expired, but all of the same are still in full force and life and subject to the lien of the above mortgage and will pass in like full force and life to any purchaser or purchasers on a sale under such mortgage and to any new
10 corporation organized by such purchaser or purchasers pursuant to the laws of New York.

2. That the Lebanon Springs Railroad Company possessed and enjoyed all the powers, rights and franchises above mentioned until it became consolidated with the Bennington and Rutland Railroad Company as hereinafter declared.

3. That on the first day of July, 1867, the said Lebanon Springs Railroad Company duly issued and sold its bonds to the amount of two millions of dollars, to individuals and to towns.

That to secure the payment of said bonds the said Lebanon Springs Railroad Company, on the first day of July, 1867, duly executed and delivered to the defendant The Union Trust Company of New York, a corporation organized and then and still existing under the laws of New York, its certain mortgage bearing date on that day, whereby it duly mortgaged all its property, right, powers, and franchises, including all the premises, property, rights, powers and franchises hereinabove stated, to the said The Union Trust

Company of New York, in trust, to secure the payment of the said bonds.

That said bonds bore interest at the rate of seven per centum per annum, payable on the first days of January and July in each year and the principal in thirty years from the date thereof.

That said mortgage was, at the time of the foreclosure and sale hereinafter mentioned, the first mortgage and lien upon all the said property, powers and franchises, and contained a proviso in substance the same as the condition of said bonds, and with power and authority in case of default in the payment of the principal, or of the interest thereon, as therein specified, to sell the said mortgaged property in due form of law.

4. That the plaintiff Stevens is the owner and holder of
11 said bonds to the amount of two thousand two hundred dollars stated at par value of the principal of the same.

That the plaintiff Rogers is the owner and holder of said bonds to the amount of one thousand dollars, stated at par value of the principal of the same, and has owned the same ever since the year 1868.

That the plaintiff Wilbur is the owner and holder of said bonds to the amount of one thousand dollars, stated at par value of the principal of the same; that she inherited the same from her aunt, Elvira B. Peabody, who died 21st August, 1881.

That the plaintiff Douglas is trustee under the last will and testament of William Henry Douglas, deceased, who died at Buffalo, N. Y., in 1875, leaving a last will and testament, which was duly admitted to probate in that county; that as such trustee he owns and holds said bonds to the amount of twelve thousand four hundred dollars, stated at par value of the principal of the same; that such bonds came into his possession as such trustee as assets of the estate of the said deceased; that the said deceased had a contract for the construction of part of the railroad of said Lebanon Springs Railroad Company, under which he performed work at the time of the original construction of said railroad.

That the plaintiff Harrison is the owner and holder of said bonds to the amount of fifty thousand dollars, stated at par value of the principal of the same, and has owned the same ever since the year 1868.

That no part of the interest thereon nor upon any of said bonds has been paid since the year 1870.

5. That early in the year 1870 the Lebanon Springs Railroad Company duly consolidated its road, franchises and property with the road, franchises and property of the Bennington and Rutland Railroad Company, a corporation theretofore duly organized and existing under the laws of the State of Vermont and owning and operating a railroad from Bennington in that State, where it connected with the railroad of the Lebanon Springs Railroad Company, to Rutland, in said State, and also a branch two miles long running from North Bennington westerly to the New York State line, and one company was thus formed of said two companies under the name of the Harlem Extension Railroad Company, which

said last-named corporation became entitled to all and singular the rights, properties and franchises of said two railroad companies, and subject to all their and each of their respective liabilities.

6. That afterwards and on the first day of April, 1870, the said Harlem Extension Railroad Company executed its certain bonds amounting in the aggregate to the sum of four millions of dollars and bearing interest at seven per centum per annum; of which, however, only the sum of one million five hundred thousand dollars *were* issued, and at the same time and to secure the payment of the said bonds it executed to the Union Trust Company of New York a mortgage upon all its property, roads and franchises which contained a proviso in substance the same as the conditions of the said bonds. The remainder of the said bonds of the said Harlem Extension Railroad Company, being two million five hundred thousand dollars thereof, were reserved to take up and be
12 exchanged for the two million dollars of bonds of the Lebanon Springs Railroad Company before mentioned, and five hundred thousand dollars of bonds which had been issued by the said Bennington and Rutland Railroad Company, but such bonds of the Lebanon Springs Railroad Company and the Bennington and Rutland Railroad Company were never surrendered or exchanged, and accordingly only one million five hundred thousand dollars of the said bonds of the Harlem Extension Railroad Company were ever issued as above stated.

7. That the plaintiff Stevens is the owner and holder of said bonds to the amount of five thousand dollars stated at par value of the principal of the same; that the plaintiff Douglas, as trustee as aforesaid, is the owner and holder of said bonds to the amount of one thousand dollars, stated at par value of the principal of the same.

8. That the interest upon the said bonds of the Lebanon Springs Railroad Company was paid up to and including that due in January, 1869, but that nothing has ever been paid upon any of them since, and nothing at all has been paid upon any of the bonds issued by the Harlem Extension Railroad Company.

That both said mortgages were duly recorded in the clerks' offices of the counties of Columbia and Rensselaer, according to the laws of the State of New York, and in the county of Bennington, in the State of Vermont, according to the laws of the State of Vermont.

9. That on the 22d day of February, 1872, the Union Trust Company of New York began an action in the supreme court of New York, to foreclose the said mortgage, executed by the said Lebanon Springs Railroad Company, by reason of the aforesaid default in the payment of interest thereon, in which action The Lebanon Springs Railroad Company, The Harlem Extension Railroad Company, William Butler Duncan and James B. Hodgskin were
13 made defendants. That due notice of the pendency of said action, according to law and the practice of that court, was duly filed in the offices of the clerks of the counties of Rensselaer and Columbia on the 24th day of February, 1872, and that all the defendants in such action were duly and regularly served with the

process of this court and subjected to the jurisdiction thereof, and duly and regularly appeared in such action therein, prior to the first day of May, 1872.

That on or about the 15th November, 1872, it filed bills in the court of chancery, of the State of Vermont, to foreclose both of said mortgages, in which actions The Lebanon Springs Railroad Company and The Harlem Extension Railroad Company were made defendants, which defendants were regularly served with process and submitted to the jurisdiction of, and appeared in, that court, in both such actions, prior to the first December, 1872.

10. While the above-mentioned actions were pending, and on the 18th December, 1872, the Harlem Extension Railroad Company and the Pine Plains and Albany Railroad Company, a corporation duly existing under the laws of the State of New York, duly consolidated their roads, property, franchises and capital stock and thus formed one company under the name of the Harlem Extension Railroad Company; and certain other railroad companies then existing under the laws of the State of New York, namely: the New York and Boston Railroad Company, the Putnam and Dutchess Railroad Company and the Dutchess and Columbia Railroad Company, on the 18th December, 1872, duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of the New York, Boston and Northern Railway Company, and afterwards and by an agreement made the 19th December, 1872, but not filed in the office of the secretary of state of New York until 21st January, 1873, the said last named,
14 the Harlem Extension Railroad Company, and the New York, Boston and Northern Railway Company duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of The New York, Boston and Montreal Railway Company, which is one of the defendants herein.

That such several consolidations were legal and duly and strictly in accordance with the laws of New York and Vermont, and the defendant The New York, Boston and Montreal Railway became thereby the owner of, and entitled to all the roads, property and franchises of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as hereinbefore stated, subject to the said mortgage given by the Lebanon Springs Railroad Company, and also of all the other mortgages above named, and subject to all of their and each of their respective liabilities, and to the pendency of said actions.

11. That the above-mentioned foreclosure suits were proceeded with, and such proceedings had therein that, in the first said action in the supreme court of New York, judgment of foreclosure of the said mortgage given by the Lebanon Springs Railroad Company, and for a sale of all the road, property, powers and franchises of the Lebanon Springs Railroad Company within this State, was duly rendered by said court in that action, and was on the same day duly entered in the clerk's office of Rensselaer county, which said judgment is in the words and figures following:

15 At a special term of the supreme court of the State of New York held at the court-house, in the city of Troy, county of Rensselaer, on the 10th day of December, 1872.

Present: Hon. William L. Learned, justice.

UNION TRUST COMPANY OF NEW YORK, as Trustee,
against
THE LEBANON SPRINGS RAILROAD COMPANY, THE HARLEM Extension Railroad Company, William Butler Duncan, James B. Hodgskin.

On reading and filing the affidavit of S. T. Fairchild, attorney for the plaintiff in this action, proving the service of the summons and notice of object of suit in this action; and the affidavit of said attorney for the plaintiff that no answer or demurrer has been put in to the complaint in said action, and that due notice of the pendency of this action was duly filed in the offices of the clerks of the counties of Rensselaer and Columbia, on the 24th day of February, one thousand eight hundred and seventy-two, and on reading and filing the report of the referee to whom it was referred by an order of this court to compute the amount due and to become due to the plaintiff upon the bonds and mortgage mentioned and set forth in said complaint, by which report, bearing date the 10th day of December, 1872, it appears that the sum of five hundred and fifty-two thousand two hundred and twenty-two dollars and twenty-two cents

16 was actually due upon said bonds and mortgage at the date of said report for interest, and that the further sum of two millions of dollars will become due to said plaintiff on the first day of July, 1891, for principal upon said bonds and mortgage, besides interest thereon from the date of said report; and on motion of S. T. Fairchild, attorney for the plaintiff, it is ordered, that the said report be and the same hereby is in all things confirmed, and on like motion as aforesaid it is adjudged that the mortgaged property and premises described in the complaint in this action as hereinafter set forth be sold together and not separately, at public auction, in said county of Rensselaer by or under the direction of Charles S. Fairchild, who is hereby appointed as referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that either or any of the parties to this action may purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the property and premises sold; that out of the moneys arising from such sale after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold at the time he pay to the plaintiff or its attorney the sum to be taxed hereby adjudged to the plaintiff for costs and charges in this action from the date hereof, which costs have this day been adjusted and taxed by the clerk of said county of Rensselaer, as ninety-seven dollars and forty-nine cents, and that he also pay to the plaintiff the amount so reported due as aforesaid, together with the legal interest thereon from the date of the said report, or so much thereof as

the purchase-money of the mortgaged premises will pay of the same, take a receipt therefor and file it with his report of sale; and he deposit the surplus money (if any) with the Union Trust Company of New York to the credit of this action to be drawn only on the order of this court signed by the clerk and a judge thereof within
17 five days after he receives the same; that he make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff with the interest and costs as aforesaid the said referee specify the amount of such deficiency in his report of sale, and that the defendant The Harlem Extension Railroad Company pay the same to the plaintiff, and that the purchaser or purchasers at such sale be let into possession on production of the said deed.

And it is further adjudged that the defendants and all persons claiming under them or any or either of them after the filing of the aforesaid notice of pendency of this action be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

The following is a description of the mortgaged property and premises hereinbefore mentioned, as contained in said mortgage, viz:

("All the right, title and interest of the said party of the first part of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all lands hereafter to be acquired for the purpose of forming said track or roadway, also the railroad of the said party of the first part now built and to be built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part connected with said railway or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock; locomotives, tenders, snow-ploughs and scrapers, all the passenger cars, baggage, mail and
18 express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be, and be sold therewith and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid to the village of Bennington, in the State of Vermont,

including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining or which may at any time belong or appertain to the same as well in law as in equity."

Granted Dec. 10th, 1872.

W. L. L.

Filed Dec. 10th, 1872, at 11 h. 30 a. m.

Under said judgment the property and franchises therein described were sold on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by said court in that behalf, at Greenbush, in the county of Rensselaer, to the defendant William Butler Duncan for the price of one hundred thousand dollars, and said referee thereupon, by direction of the said Duncan and the said The Union Trust Company of New York, executed and delivered to the defendant James C. Hull his deed of the said roads, property and franchises, bearing date the said 25th January, 1873, and
19 said deed was duly recorded in the clerks' offices of Rensselaer and Columbia counties.

On the 7th day of December, 1872, decrees of foreclosure of the same mortgages, and directing a sale of all the roads, property, powers and franchises within the State of Vermont of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as set forth in the first finding above, were duly passed by the court of chancery of Vermont, and enrolled and filed in that court as aforesaid; that said decree in the first of such actions was in the words and figures following:

Decree.

STATE OF VERMONT, }
Bennington County. }

December Term.

THE UNION TRUST COMPANY OF NEW YORK }
against }
THE HARLEM EXTENSION RAILROAD COMPANY and } In Equity.
THE LEBANON SPRINGS RAILROAD COMPANY. }

Decree.

And now upon the orators' bill in this cause on file, setting forth the charter of the Vermont and New York Railroad Company, the location and partial construction of the Vermont and New York railroad, extending from the village of Bennington, in the county of Bennington, to the State line between Vermont and New York, at Hoosick, in the county of Rensselaer, and State of New
20 York; the due conveyance of said road to the Lebanon Springs Railroad Company; its completion so as to connect the Lebanon Springs railroad at said Hoosick with the Bennington

and Rutland railroad at Bennington; the consolidation of the stocks, franchises and property of said Lebanon Springs Railroad Company and of said Bennington and Rutland Railroad Company, and the formation thereby of the Harlem Extension Railroad Company; the execution by said Lebanon Springs Railroad Company before said consolidation of a mortgage of said Vermont and New York railroad to the orators as trustees to secure the payment of the bonds of said Lebanon Springs Railroad Company and the interest thereon; the non-payment of said interest when due and the forfeiture thereby of the condition of said mortgage, and upon due appearance of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company by their respective solicitors, said bill having been taken as confessed, and the cause having been referred to a master to ascertain the amount due under said mortgage, by whose report on file it appears that there is due of unpaid interest under said mortgage the sum of four hundred and ninety thousand dollars, all which by the files, records and entries in this cause in this court remaining and which are hereby referred to as the basis of this decree will more fully and at large appear;

It is ordered, adjudged and decreed by the court, at this term, that the said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company pay to the orators as trustees the said sum of four hundred and ninety thousand dollars, with interest hereafter to accrue and the costs of this suit taxed at the sum of thirty-one dollars and thirty-five cents before the 20th day of January, 1873.

And in default of such payment that all the said mortgaged property, namely, the said railroad formerly known as the
21 Vermont and New York railroad, its rights, privileges and appurtenances, and all the franchises to possess, own, maintain and operate the same, and all the right, title, estate and interest of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company therein, shall be sold at public auction to the highest bidder, for cash, on the 20th day of January, 1873, at two o'clock in the afternoon, at the court-house in Bennington, in the county of Bennington, to satisfy this decree.

And Daniel McEowen, Esq., of Bennington, is hereby appointed a special master in chancery to conduct and make said sale.

And he is hereby directed to give notice of said sale by advertising the same and the substance of this decree once a week for five weeks next preceding said sale in the Bennington Banner, newspaper, published at Bennington aforesaid; in the Manchester Journal, newspaper, published at Manchester, in said county of Bennington; in the Rutland Herald, newspaper, published at Rutland, in the county of Rutland, and in the New York Daily Times, newspaper, published in the city of New York.

And to hold said sale at the time and place appointed in conformity with the direction of this decree and the terms of said advertisement, and to sell said mortgaged property and franchises to the highest bidder, for cash, at fair public vendue, and to execute a suitable and sufficient conveyance thereof to the purchaser, which

shall recite the substance of this decree and the proceedings under it, and shall be executed in the manner required by the laws of this State.

And said master shall make due and full return of his proceedings to this court, and shall pay into court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and prove their claims under the direction of the court.

22 And if said proceeds shall be more than sufficient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the court upon application of parties in interest.

And said master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as may be allowed by the court upon his application.

And the orators shall be allowed from said fund their just charges and expenses.

Done in court at said Bennington this 6th day of December, 1872.

HOYT H. WHEELER, *Chancellor.*

E. J. PHELPS,
Sol'r for Orators.

This decree is certified to be in due form and correct.

E. J. PHELPS, *Solicitor.*

Filed in court Dec. 7th, 1872.

JOHN V. HALL, *Clerk.*

And under and in pursuance of such decrees the said road, property, powers and franchises within the State of Vermont, were, by Daniel McEowen, a special master in chancery, appointed by the said court for that purpose on the 20th of January, 1873, sold to Trenor W. Park, of Bennington, Vermont, for the sum of twenty-five thousand dollars, and that by direction of the said Trenor W. Park and the said The Union Trust Company of New York, the said special master executed and delivered to the said Charles G. Lincoln deeds of said road, property, powers and franchises bearing date the said 20th January, 1873, and said deeds were duly recorded in the office of the clerk of the county of Bennington, Vermont, on the 22d January, 1873.

That no part of either of said sums of one hundred thousand dollars and twenty-five thousand dollars has ever been paid. On the 28th January, 1873, the said defendants Hull and Lin-

23 coln executed and delivered to the defendant Duncan and the said Trenor W. Park a bond conditioned for the payment of five millions of dollars on or before the first of August, 1873, with interest at seven per centum per annum, and also they and the defendant Melissa A. Hull executed and delivered to said Duncan and Park a mortgage to secure the payment of the same, conveying all the roads, property, powers and franchises of the Harlem Extension Railroad Company, including those of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company

in both States, as hereinbefore set forth. Said mortgage was recorded in the offices of the clerks of Rensselaer and Columbia counties on the 14th February, 1873, and in the clerk's office of Bennington county, Vermont, on the 1st May, 1873.

That on the thirtieth January, 1873, the defendants James C. Hull and Melissa A. Hull, his wife, by their deed executed and delivered on that day, without any consideration, conveyed all said roads, property and franchises, situated in the State of New York, to the defendant The New York, Boston and Montreal Railway Company, subject, however, to said mortgage to said Duncan and Park; that at the same time the defendant Lincoln, by a deed executed and delivered by him, likewise for no consideration, conveyed said roads, property and franchises situated in the State of Vermont to the New York, Boston and Montreal Railway Company, subject, however, to said mortgage to Duncan and Park, and said five-hundred-thousand-dollar mortgage on the old Bennington and Rutland railroad.

That all such acts of the said Hull, Lincoln, Duncan and Park were done for the sole use and benefit, and in behalf of, and as agents and trustees for, the holders of the bonds issued by the Lebanon Springs Railroad Company, and the Harlem Extension Railroad Company, as aforesaid, by virtue of agreements validly made by them to so act, and that the said mortgage for five millions of dollars had no other consideration.

That the defendant The Union Trust Company of New York has done nothing in the premises except as above alleged, and has neglected ever since to prosecute such action, or the proceedings for such sales with diligence or at all.

24 12. That the said five-million-dollar mortgage made to Duncan and Park represented substantially the aggregate indebtedness, being the aforesaid bonds of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, which the defendant The New York, Boston and Montreal Railway Company was to assume and pay according to the terms of the consolidation agreement by which it was formed, and of the above-mentioned other agreements and arrangements under which the property of said Harlem Extension Railroad Company was to be acquired by said New York, Boston and Montreal Railway Company, as before stated, and was made in order to secure and maintain a lien upon the said premises, for the payment of such indebtedness, and that in accordance with such arrangement an agreement was made on or about February 11th, 1873, between the defendant The New York, Boston and Montreal Railway Company and the said Duncan and Park, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company, to the defendant Duncan, who was to have the custody of said moneys and to disburse the same, to secure the payment and discharge of the aforesaid five-million-dollar mortgage, and that in pursuance of said agreement and other agreements and arrangements, relating to the same matter, the said bond and mortgage, together with a satisfaction thereof, in writing, were

placed in the custody of Jesse Seligman and John Crosby Brown, two of the trustees in said agreements mentioned, who were in accordance with the provisions of the said agreements and arrangements and were authorized by power of attorney to receive and to endorse upon said bond the payments that should be made thereon, and upon full payment thereof, if within the time stipulated, to file said satisfaction piece and thus discharge said mortgage of record, but in case of a failure by said company to pay the full amount due on or before the first day of August, 1873, to redeliver such
25 bond and mortgage with the satisfaction piece to the mortgagees. But in and by said agreements and arrangement- it was further provided that if the said company should fail to pay for the reasons therein mentioned the amount due upon said bond and mortgage on or before August 1st, 1873, that then upon certain conditions the payment of such sum should be extended for eighteen months from said first day of August, 1873.

13. That said last-named company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which long since and on or before February 1st, 1875, became wholly due and payable; but wholly failed to pay on or before said last-mentioned day, or at any other time, the remainder, being much the larger part of the sum due upon said bond and mortgage, and has never paid the same, nor any part of the same, and has never completed its railroad, and has become insolvent, and abandoned its undertaking, and is wholly unable to pay the same or any part thereof. The defendant Daniel Butterfield was appointed by the supreme court of the State of New York receiver of all its property and effects, on or about the 15th day of April, 1875, and that he has never taken any action whatever towards completing said railroad or carrying on its enterprise or fulfilling its obligations, but has wholly failed to do so.

14. That during the year 1873, the New York, Boston and Montreal Railway Company executed and delivered a certain mortgage to secure bonds to the aggregate amount of twelve millions two hundred and fifty thousand dollars to the defendants Jesse Seligman, William Watts Sherman and John Crosby Brown. Said mortgage was recorded on the 15th day of March, 1873, in the clerk's office of Rensselaer county, in Book 138 of Mortgages, at page 1.

26 That afterwards and on the first day of April, 1873, the New York, Boston and Montreal Railway Company executed and delivered another certain mortgage to secure other bonds to the aggregate amount of twelve millions seven hundred and fifty thousand dollars to the New York Loan and Indemnity Company. Said mortgage was recorded in Rensselaer county clerk's office on the 26th day of June, 1873, in Book 140 of Mortgages, at page 21.

The bonds under both said last-mentioned mortgages were issued and many of both were sold by the New York, Boston and Montreal Railway Company and are still outstanding.

The said New York Loan and Indemnity Company was a corporation created and then existing under the laws of the State of

New York. On the 19th day of April, 1877, by a judgment and order of this court, the said New York Loan and Indemnity Company was adjudged to be dissolved and its charter annulled; and by the same order and judgment Charles H. Cheever and John T. Banker were appointed receivers of all its property and effects. Said Cheever and Banker duly gave their bonds as such receivers which were duly approved and duly made their oaths and the said oaths and approved bonds were duly filed on the 23d day of April, 1877; and the said receivers entered upon their duties as such. On the 27th day of October, 1881, by an order of this court, the said receivers were duly discharged and their bonds duly canceled.

On the 19th day of April, 1877, the following persons were the directors of the New York Loan and Indemnity Company: The defendants Wm. H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, John A. Nichols, Charles H. Dewing, Timothy Cornwall, John H. Cheever, Henry A. Tweed, Reuben W. Van Pelt, and also one Andrew McKinney, who has since died.

15. That by reason of the insolvency of the New York, Boston and Montreal Railway Company and its failure and inability
27 to complete and operate the railroad hereinafter described, or to pay the amount due upon said five-million-dollar mortgage, being the consideration for such transfer to it as hereinbefore found, the New York, Boston and Montreal Railway Company have no title to the said Lebanon Springs railroad, its franchises and property, as against the holders of the bonds, so, as aforesaid, issued under said mortgages for the two million dollars, and for the four millions of dollars, and that as against the said New York, Boston and Montreal Railway Company, and the receiver as aforesaid of said company, the said bondholders are entitled to hold and possess said railroad company, its property and its franchises, and to have the same sold for their benefit, and that the plaintiff and the other bondholders are now entitled to the benefit and advantage of the said five-million-dollar mortgage, and that the said Duncan holds the same for them and they are entitled to have the same enforced for their benefit.

16. That afterwards a bill was duly filed in the court of chancery of the State of Vermont, where a portion of the mortgaged premises are situated, for the foreclosure of said mortgage made by Hull and Lincoln for $5,000,000 against the defendants James C. Hull, Melissa A. Hull, his wife, Charles G. Lincoln, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as receiver of the property and effects of the New York, Boston and Montreal Railway Company. Subpœnas duly issued therein with the said bill were duly served upon said defendants and such proceedings were afterwards had therein that in the year 1883, a decretal order was entered therein foreclosing said mortgage and directing a sale of the whole of said mortgaged premises, and that this plaintiff and other like bondholders are entitled to have said sale proceeded with for their benefit and on their behalf.

28 17. That the defendant Duncan and the defendant McCullough, as administrator of the goods, chattels and credits of

the said Park, have no title to or interest in said mortgage executed by the said Hull and Lincoln for five millions of dollars save their interest as holders of the bonds of the Lebanon Springs Railroad Company.

18. That the said railroad hereinafter described was operated by or on behalf of the New York, Boston and Montreal Railway Company until some time in November, 1873, when said company leased said road to the Central Vermont Railroad Company, by which it was operated until the 20th August, 1877, when it withdrew from the possession of and abandoned the same.

That in the meantime the said New York, Boston and Montreal Railway Company had failed to fulfill its obligations and became insolvent and abandoned its enterprise as hereinbefore found, and said Lebanon Springs railroad when surrendered and abandoned by its lessee lay unoccupied and unoperated until some time in September, 1877, when it was taken possession of by one Russell C. Root.

19. That the possession of said road was subsequently delivered by said Root to a corporation called the "Harlem Extension Railroad South Coal Transportation Company," a corporation which was organized under the general manufacturing laws of New York, by the said Root, who was its first president, and continued to be its president until said road came into the possession of John W. Van Valkenburgh, as receiver, as hereinafter stated.

That on the twenty-seventh November, 1877, said Root delivered possession of said property to said last-named company, which continued in possession of and operating the same until said road came into the possession of John W. Van Valkenburgh, as here-
29 inafter stated. During that time or prior thereto, said road and property became much worn and depreciated.

20. That in the year 1880 an action was brought in this court by the defendant Marvin Sackett, who claimed to be the owner of eight thousand five hundred dollars of the bonds so issued by the Lebanon Springs Railroad Company, against the said Root, the said Harlem Extension Railroad South Coal Transportation Company, the said New York, Boston and Montreal Railway Company, and the said Daniel Butterfield as receiver of said last-named company, and no others. That said railway company and said Butterfield made default therein, but that by collusion of the said Sackett, the said Root and the said transportation company, on the first day of October, 1880, an order was made in that action at the special term of this court, held at the city of Kingston, which purported to appoint John W. Van Valkenburgh receiver of "all the rights and franchises which at any time were owned, held and possessed by the Lebanon Springs Railroad Company or by any of the parties at that time defendants to this action, of, in or to the several pieces or parcels of land constituting the track or roadway of a railroad extending and starting from the village of Chatham, in Columbia county, New York, and extending northerly and easterly through the counties of Columbia and Rensselaer, to the easterly boundary of this State, in the town of Hoosick, in said county of Rensselaer,

together with all the rails, bridges, fences, stations, buildings and structures thereon, and of the estate and franchises of said company, and all the powers, rights, privileges and authority thereto appertaining, of the rents, tolls and incomes, of the title deeds, leases, contracts and leased property, and of all the rights thereunder, wherever any or all of said property may be situated, collected, exercised or enjoyed, whether in the State of New York or also
30 in the State of Vermont, so far as the laws of that State will allow, and of all the books, papers and vouchers, including the book of minutes kept by the railroad company, and in use up to and at the time of the foreclosure sale of the railroad property."

Said Van Valkenburgh filed his bond and entered into possession of said railroad, and continued in possession of and to operate the same until he delivered possession of the same to William V. Reynolds, as hereinafter stated.

21. That on the second day of April, 1881, upon motion of said Van Valkenburgh, at a special term of this court held at the city of Kingston, an order was made in the last-mentioned action, whereby it was ordered that the said John W. Van Valkenburgh, as such receiver, issue, under his hand, receiver's certificates of indebtedness dated on that day payable, in five years, with interest at six per cent., payable on the first of January and July in each year, to the aggregate amount of $350,000, each certificate of the amount of five hundred dollars. And it was by such order ordered and declared and decreed that such certificates should be a first lien on said railroad bed, tracks, ties, bridges, trestles, culverts, engines, cars, depots and all and every kind of property either owned by said railroad company or in the possession of the receiver thereof, and were to be recognized as such in any reorganization of the company, or in its consolidation with any other company; and in case of any sale of the said railroad, the property in the hands of the receiver and franchises, under any decree of the supreme court, those certificates were to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and canceled by him from the earnings of the said railroad. But in case said railroad and property in the hands of the receiver and franchises on any sale thereof should not bring sufficient to pay the full amount and interest then due on the outstanding nego-
31 tiated certificates thereinbefore authorized to be issued, then the purchaser of said railroad and property in the hands of the receiver and franchises was to assume, as a first lien thereon, so much thereof as at the time remained outstanding and unpaid, with the interest thereon.

That said Van Valkenburgh as such receiver signed and issued all of such certificates and parted with the same in such way that he realized for the whole of them in cash the sum of $210,000, and no more; but that William V. Reynolds, receiver, as hereinafter stated, has always denied that the same were validly issued, or could be enforced for more than a part of the face of the same, if at all.

That substantially all of such certificates are held by the defendants Bonner, Strait, Van Alstyne, Carter, Butler as receiver, The Cen-

tral National Bank of Boston, and The Massachusetts Mutual Life Insurance Company, Allen, Loutrell, French, Wright, Dickson, White, Gilbert, Gilbert and Van Tine. That all or substantially all of such parties obtained the same, in the first instance, for much less than their face value, but under what circumstances or agreements plaintiff does not know.

22. That out of said sum of $210,000 said Van Valkenburgh paid large sums, exceeding $50,000, to persons who presented claims to him, but who, if their claims were valid, were merely general creditors, posterior in date to the said two mortgages of two millions and four millions of dollars. That one of such claims for more than $3,000 was of the said Marvin Sacket and was paid to him.

23. That on the 25th of June, 1883, at a special term of this court, upon the resignation of said Van Valkenburgh, an order was made in the action brought by said Sackett which by its terms appointed said William V. Reynolds receiver in his place. That said Reynolds entered into possession of said railroad and property and so
32 continued until he delivered possession to defendants Foster and Hazard.

24. That said Trenor W. Park died intestate 13th December, 1882, and defendant McCullough was duly appointed administrator of the goods, chattels and credits which were of said Trenor W. Park, and filed his bond and accepted, and is acting.

25. That afterwards, and in or about the month of January, 1885, the said action brought by Marvin Sackett was brought to trial in this court, in the county of Rensselaer, upon the motion of said Marvin Sackett and without the appearance of anybody else except the defendant The Central National Bank of Boston, and a trial was had between those two parties only, whereby judgment was rendered directing a sale of the railroad and property hereinbefore described, subject to the principal of the certificates so issued by the said Van Valkenburgh, but directing the payment of the interest thereon out of the purchase-money realized upon such sale. That under that judgment the said railroad and property was afterwards sold to the defendants Foster and Hazard for the sum of one hundred and fifty five thousand dollars, which was paid by them and the usual referee's deed of the said railroad and property was made and delivered to them, and they were put into possession of the said railroad and property, and remained so in possession until they delivered possession of the same to the defendant The New York, Rutland and Montreal Railway Company, as hereinafter stated, and by orders of this court the said receivership was terminated and the said receiver discharged.

26. That out of the said sum of one hundred and fifty thousand dollars the interest upon the said certificates, down to and including the first day of July, 1885, was paid, amounting to about
33 the sum of fifty-six thousand dollars, and the remainder of said sum of $155,000 was entirely exhausted in discharging the unpaid debts of the said Van Valkenburgh's receivership, the compensation of the receivers and their counsel, and the costs and allowances of the suit.

That said suit by said Sackett was brought and conducted, not with the intention of realizing the said property for the benefit of the bondholders or any of them, or of himself as a bondholder, but collusively and with the intent that he and others should receive large sums of money from the said property under color of the payment of claims which, even if valid, were subordinate to said mortgages.

And with the intent that said railroad and property should be acquired by others free from the lien of said mortgages, and without realizing anything to the holders of said bonds.

27. That the defendant The New York, Rutland and Montreal Railway Company is a corporation organized and existing under the laws of the State of New York, and that prior to the first day of July, 1885, it executed and delivered to the defendant The American Loan and Trust Company, which is also a corporation organized and existing under the laws of New York, a mortgage to secure bonds to the amount of many millions of dollars, by which mortgage it conveyed and bound all of its property, both acquired and to be acquired. That after the first day of July, 1885, the said Foster and Hazard and their wives executed and delivered to the said The New York, Rutland and Montreal Railway Company a conveyance of said railroad and property, and delivered the possession of the same to the said last-named company, which has ever since been and still is in possession of the same. That the said last-named company thereupon issued and sold its bonds, secured by said mortgage as aforesaid, to the amount of more than a million of
34 dollars. That it paid the interest upon the said certificates to and including the first day of January, 1886, but none since.

28. That afterwards the defendant The Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated at par of the principal of the same, brought an action in this court against the defendants Foster, Hazard, The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company. That in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates. That action was removed into the circuit court of the United States, and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates.

29. Plaintiffs further show that the pay-rolls of employés upon said property are in arrear and unpaid for four months. That the New York, Rutland and Montreal Railway Company is wholly insolvent and its credit entirely exhausted, and there is imminent danger that the operations of such road will cease and the property thereby be greatly depreciated in value.

30. That all the defendants claim some right or interest in the said railroad and property, which, if any, has accrued since, and is subordinate to, the mortgages of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company.

Plaintiffs therefore pray:

1. That it may be adjudged that the owners of the bonds issued by the Lebanon Springs Railroad Company have a first lien upon the said railroad and property, and the owners of the bonds
35 issued by the Harlem Extension Railroad Company a second lien thereon, in preference of all others. That the bond and mortgage executed by the defendants Hull and Lincoln to the defendant Duncan and the said Park is held for the benefit of the owners of said bonds and represents their interest solely, and that defendants Brown and Seligman redeliver the same.

2. That the judgment in the action brought in this court by the defendant The Union Trust Company, and the decrees in the two actions brought by that company in the court of chancery of Vermont, be now specifically enforced, and the mortgage by the said Hull and Lincoln be now foreclosed, and that the said railroad and property be sold under said judgments and decrees, and said mortgage of Hull and Lincoln, for the benefit of this plaintiff and all other of the owners of the Lebanon Springs and Harlem Extension bonds, and that all of the defendants in this action be barred and foreclosed of all right, title, interest and equity of redemption, of, in and to the said railroad and property and any part of the same.

3. That it may be adjudged that the certificates issued by the said Van Valkenburgh were beyond, the power of this court to issue and are of no validity except to bind the interest represented by the eight bonds of the said Marvin Sackett, and the interests of the defendants in the action brought by said Sackett.

4. That all of the defendants in this action and all other persons be enjoined, as well temporarily by order as permanently by judgment, from interfering with any part of the said railroad or property.

5. That a receiver be appointed, with the usual powers of
36 receivers, to take possession of, preserve and operate said railroad and property until further order of the court.

6. That the plaintiffs have such other and further relief as to the court shall seem just, besides costs.

CAMPBELL & PAIGE,
Attorneys for Plaintiff,
102 *Broadway, New York, N. Y.*

STATE OF NEW YORK, }
County of Kings, } ss:

Ida S. Harrison, being duly sworn, says: That she is one of the plaintiffs above named, and that the foregoing complaint is true to her own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

IDA S. HARRISON.

Sworn to before me this 8th day of Dec., 1890.

GEO. O. VANDER BOGART,
Notary Public, Kings Co., N. Y.

37 Supreme Court, Rensselaer County.

AARON R. STEVENS
against
THE CENTRAL NATIONAL BANK OF BOSTON, Impleaded with THE UNION TRUST COMPANY OF NEW YORK and Others.

Answer of the Defendant The Central National Bank of Boston.

First. This defendant, upon information and belief, admits the following allegations of the complaint:

1. That the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation under and by virtue of the laws of the State of New York and of the State of Vermont, and that it became possessed and the owner of the property described in the first paragraph of the complaint, which was described or mentioned in or subject to the lien of the mortgage executed by said Lebanon Springs Railroad Company, bearing date the 1st day of July, 1867.

2. The allegations in the third paragraph of said complaint.

3. That nothing has ever been paid upon any of the said bonds of the said Lebanon Springs Railroad Company since about January, 1869, to which time interest on said bonds was paid; that the mortgage executed and delivered to the defendant The Union
38 Trust Company of New York to secure said bonds was duly recorded in the clerks' office of the counties of Rensselaer and Columbia.

4. The allegations in paragraph nine of said complaint, so far as they relate to the action brought by the Union Trust Company of New York to foreclose the said mortgage executed by the said Lebanon Springs Railroad Company, and, also, so far as they relate to the bill filed in the court of chancery in the State of Vermont to foreclose said mortgage.

5. The allegations in the eleventh paragraph of said complaint, so far as they relate to the foreclosure suit brought in this court by the Union Trust Company of New York for the foreclosure of the said mortgage executed by the said Lebanon Springs Railroad Company, and the judgment in said action; and, also, so far as they relate to the decree of foreclosure which was passed by the court of chancery of the State of Vermont, and enrolled and filed in that court, in the bill therein filed by the said The Union Trust Company of New York, to foreclose the said last-named mortgage; and, also, the allegations in said eleventh paragraph of said complaint, that the grantees named in the deeds therein mentioned, to wit: James C. Hull and Charles G. Lincoln, executed and delivered a bond and mortgage as therein alleged, and deeds to the New York, Boston and Montreal Railway Company, subject to said mortgage

as therein alleged, and the allegations that all such acts of the said Hull, Lincoln, Duncan and Park were done for the sole use and benefit and in behalf of, and as agents and trustees for the holders of the bonds issued by the Lebanon Springs Railroad Company; and that the said mortgage for $5,000,000 had no other consideration; but this defendant denies any knowledge or information sufficient to form a belief as to whether the said acts were also done for the use or in trust for the holders of any bonds issued by the Harlem Extension Railroad Company.

39 6. This defendant also admits that the New York, Boston and Montreal Railway Company became insolvent as alleged in paragraph thirteen of said complaint, and that the defendant Daniel Butterfield was appointed by the supreme court of the State of New York receiver of all the property and effects of said railway company, and that he has never taken any action toward completing said railroad, or carrying on its enterprise or fulfilling its obligations, as alleged in said thirteenth paragraph.

7. This defendant admits upon information and belief the allegations contained in the seventeenth paragraph of said complaint.

8. Upon information and belief it admits the allegations contained in the eighteenth and nineteenth paragraphs of said complaint.

9. It admits that in the year 1880 an action was brought in this court by one Marvin Sackett, who claimed to be the owner of $8,700 of the bonds so issued by the said Lebanon Springs Railroad Company, against Russ C. Root, the Harlem Extension Railroad South Coal Transpor on Company, the New York, Boston and Montreal Railway Co pany, and Daniel Butterfield, as receiver of said last-named company; that in said action one J. W. Van Valkenburgh was duly appointed as receiver as stated in the twentieth paragraph of said complaint, and filed his bond and entered into possession of said railroad, and continued in possession thereof, and to operate the same, until he delivered possession thereof to William V. Reynolds.

10. It admits that an order was made in said action on the 2d day of April, 1881, as alleged in the twenty-first paragraph of said complaint, and admits that said Van Valkenburgh, as such receiver, signed and issued all the certificates authorized by said order,

40 and parted with the same, and that certain of the same are held by this defendant, as hereinafter stated; but this defendant denies that this defendant obtained said certificates for much or any less than their face value.

11. This defendant, upon information and belief, admits the allegations contained in the twenty-third paragraph of said complaint.

12. This defendant, upon information and belief, admits the allegations contained in the twenty-fifth and twenty-sixth paragraphs of said complaint; but the judgment therein referred to and the terms of sale to the defendants Foster and Hazard, are not fully stated in said twenty-fifth paragraph, but are hereinafter more particularly set forth.

13. This defendant, upon information and belief, admits the alle-

gations contained in the twenty-seventh paragraph of said complaint.

14. It also admits the allegations contained in the twenty-eighth paragraph of said complaint, except the allegation that a foreign corporation called the American Finance Company, was a defendant in the action brought in this court by this defendant; but the object of said action brought by this defendant, and the proceedings and decree therein, are not fully and accurately stated in said complaint.

Second. And for further answer, this defendant, as to each and every allegation contained in said complaint, not hereinbefore specifically admitted or denied, denies any knowledge or information thereof sufficient to form a belief.

Third. And this defendant for further answer alleges, upon information and belief, that the action above referred to, in which Marvin Sackett was plaintiff, was brought not only in behalf
41 of himself, but in behalf of all other bondholders of the Lebanon Springs Railroad Company, similarly situated, who hold any of the $2,000,000 of the bonds of the Lebanon Springs Railroad Company hereinbefore mentioned, and who should be entitled to avail themselves of the benefit of that action; that in and by his complaint in said action, the said Marvin Sackett, in behalf of himself and the other of said bondholders, prayed, first, that it might be adjudged that the said The New York, Boston and Montreal Railway Company, had no title to said Lebanon Springs Railroad Company, or its franchises or property as against the holders of the bonds issued as aforesaid, under said mortgage of $2,000,000, and for whose benefit the said railroad company was purchased by the said James C. Hull on the foreclosure sale, and that as against the said New York, Boston and Montreal Railway Company, and the receiver of said company, the said bondholders were entitled to hold and possess the said railroad company, its property and franchises. Second, that said Russell C. Root and said Harlem Extension Railroad South Coal Transportation Company might be adjudged to have no right or interest in or to the possession of the said railroad property, and that a proper and fit person might be appointed as a receiver of said company, to operate and maintain said railroad company, and to hold and preserve its profits and franchises for the benefit of the bondholders as aforesaid. Third, that an injunction might be granted restraining the defendants and each and every of them from interfering with the said railroad property in any way or manner and from disposing of the same. Fourth, that a receiver of the whole of said property, railroad and franchises might be appointed with the usual powers and duties of receivers in like cases, until such time as said property and franchises might be sold under a judgment in said action, or a company or corporation formed by the bondholders to run and operate the same; and lastly, that said railroad and
42 franchises might be sold for the benefit of the bondholders and a distribution thereof made, and for general relief, as by

the complaint contained in the judgment-roll in said action, ready to be produced as this court shall direct will more fully appear.

And this defendant further alleges on information and belief that in said action said John W. Van Valkenburgh was duly and regularly appointed receiver of the Lebanon Springs Railroad Company, with the usual powers of such receivers, and this defendant further says that said John W. Van Valkenburgh was also duly and regularly appointed as such receiver in a certain other action brought by the attorney general of the State of New York, in which The People of the State of New York were plaintiffs and the said The Lebanon Springs Railroad Company was defendant. This defendant further says, upon information and belief, that although the said Marvin Sackett was the owner only of said bonds to the amount of $8,700, other bondholders representing all or nearly all of the bonds issued by said Lebanon Springs Railroad Company, as aforesaid, had knowledge of the pendency of said proceedings, and were in fact represented in said action, and had notice and knowledge of the proceedings therein, and were represented by attorneys and counsel, although not nominally parties to the record of said action. That between the time of the commencement of the said action of Marvin Sackett, and the entry of the final judgment therein, being a period of about five years, that the said road was in the hands of a receiver was a matter of public notoriety; that during said years, numerous and repeated hearings were had upon interlocutory matters in the supreme court at Troy, Albany, Kingston and other places, before Judges Learned, Ingalls, Westbrook, Peckham and Osborn; that a referee was appointed who held numerous hearings; that there were publications of different notices; that there were hearings before the committee of the legislature of this
43 State which were widely published; that the railroad commissioners of this State made various reports upon the said road, and that the said William V. Reynolds, as receiver as aforesaid, brought an action in the supreme court of this State to test the validity of the said receiver's certificates issued by his predecessor; which said action was dismissed by the court, as will more fully appear by the papers in the said action which this defendant is ready to produce as the court shall direct. This defendant further says, upon information and belief, that when said John W. Van Valkenburg was appointed receiver, said Lebanon Springs railroad was without rolling stock, and incapable of being operated, or of running its cars; and that to protect and preserve the said property, and save it from destruction, the court immediately ordered the issuing of $25,000, of receiver's certificates, money upon which the receiver obtained and expended upon the said road, and then made a report to the court in connection with one James H. Jones, a civil engineer, showing the further needs of the road; and that thereupon, in said action, an order was duly made the 2d day of April, 1881, at a special term of this court, held at the city hall in the city of Kingston, of which order a copy is annexed to this answer and made a part thereof and marked "A," and which this defendant prays may be taken as a part of this answer; that in

pursuance of said order, the said John W. Van Valkenburg, as receiver as aforesaid, issued his certificates, each for the sum of $500, amounting in the aggregate to $350,000, which certificates were in the form hereto annexed, marked " B," and hereby made a part of this answer; that the said certificates were duly issued and sold for the purposes stated in said order, and the avails thereof were used by said receiver for such purposes, and that without this money the said railroad could not have been operated, and that by its operation the mails were carried and the public were accommo-
44 dated in addition to protecting the property of the bondholders; that this defendant afterwards became by purchase the holder and owner of such certificates, amounting in the aggregate to $250,000, which it still holds and owns; that this defendant paid full value for such certificates in reliance upon the said order of this court of April 2d, 1881, and of the statements and recitals in said certificates contained; that afterwards this defendant appeared by its attorneys and counsel in the said action wherein Marvin Sackett was plaintiff, and was heard upon the trial thereof, and that upon the 12th day of January, 1885, a judgment was duly rendered in said action, and entered in the office of the clerk of Rensselaer county, which said judgment recited the appearance of counsel on behalf of this defendant, and other parties claiming to be holders of certain certificates issued by said John W. Van Valkenburg, as receiver as aforesaid, under said order of April 2d, 1881, and among other things adjudged and decreed that the certificates of indebtedness issued by John W. Van Valkenburgh, late receiver of the Lebanon Springs Railroad Company, under and by virtue of the said order of April 2d, 1881, amounting in the aggregate to $350,000, were thereby ratified and confirmed, and declared to be a first lien on said railroad and its property, as provided in and by said order of April 2d, 1881, and as stated in said certificates, for the amount of principal and interest unpaid thereon; and whereby a sale of the property, franchises, and rights of the Lebanon Springs Railroad Company was directed by a referee to whom it was referred by said judgment to make such sale for the benefit of said bondholders, and it was decreed that such sale should be made subject to the payment of the undue principal and interest of the before-mentioned receiver's certificates; and it was further provided in said judgment that the purchaser or purchasers of such railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the
45 said receiver's certificates, and that the purchaser or purchasers should assume as part of the consideration of the said purchase the payment of the said certificates, and that out of the proceeds of said sale the said referee should pay the amount of interest due on the said receiver's certificates, and such interest as might accrue and become due thereon up to the time of sale under said judgment, to the holders thereof, upon the production by them of their certificates and coupons. And this defendant further says that the said property and franchises were duly sold pursuant to said judgment, and that the defendants William Foster, Jr., and

Rowland N. Hazard became the purchasers thereof, and as purchasers were interested in a large majority of said bonds as defendant is informed and believes; that in and by the terms of sale which were signed by the said referee, and by the trustee or attorney of the said purchasers, it was provided, among other things, that the said sale was subject to the payment of the undue principal and interest upon the $350,000 of certificates, made by the said receiver according to the order of the court in said action, and that the purchaser or purchasers should assume the payment of said certificates and interest, as part of the consideration of the said purchase, and that the deed which was afterwards executed by the said referee to the said defendants Foster and Hazard was subject to the payment of the unpaid principal and interest of said certificates. And this defendant is advised and alleges that the said judgment, which had never been appealed from, reversed, or in any way vacated or modified, is binding and conclusive, not only upon the parties to said action, but upon the other holders of the said bonds issued by the said Lebanon Springs Railroad Company as aforesaid. And this defendant further says that it is advised and believes that as to any bonds issued by the Harlem Extension Railroad Company, as alleged in the said complaint, all the rights of the holders of
46 the said bonds in and to any of the property or franchises mentioned in the complaint were cut off and barred by the foreclosure suits, and the judgment or decrees therein, mentioned in the complaint herein.

Fourth. This defendant further says that on or about the 9th day of April, 1886, it brought an action in the supreme court of the State of New York in behalf of itself as well as of other holders of the said receiver's certificates, in which this defendant, suing as well for itself as for all others similarly situated, was plaintiff, and the defendants Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York were defendants; that all the defendants in said action appeared and answered therein; that after issue was joined the said action, on the petition of the defendants, was duly removed into the circuit court of the United States for the northern district of New York; that after said removal testimony was taken in said suit in behalf of this defendant as plaintiff, and in behalf of the defendants therein, and the said suit was finally brought to a hearing upon the pleadings and proofs at a term of said circuit court of the United States held in the city of Syracuse, and a decision and decree was therein made, of which decree a copy is hereto annexed and made a part of this answer, and marked "C"; that under and in pursuance of said decree the referee named therein has advertised the property and franchises in said decree described for sale, pursuant to the rules and practice of said court, and said premises are now duly advertised for sale under the said decree of the said circuit court of the United States.

Fifth. This defendant further alleges, upon information and belief, that the plaintiff herein, if he has become the purchaser and

owner of any of the bonds mentioned in said complaint, did
47 not become such purchaser and owner until after the rendition of the said judgment in this court in the action wherein Marvin Sackett was plaintiff, and after the said decree of the circuit court of the United States in the suit in which this defendant was complainant, above mentioned, and that the said purchase was made with full notice and knowledge of the rights of this defendant and of the other holders of the said receiver's certificates; that the plaintiff is not a holder of the said bonds in good faith, and has not brought this suit in good faith, but that the same is brought by him as a volunteer and for the purpose of extorting money from this defendant, and the other certificate-holders herein.

Wherefore, this defendant prays, that the complaint of the plaintiff herein may be dismissed upon the merits, and that a decree may be rendered herein recognizing and establishing the rights of this defendant as a holder of said certificates as such rights have heretofore been established by this court, and by the said circuit court of the United States; and that this defendant may have such other or further relief in the premises as may be just and equitable, together with the costs in its behalf sustained.

HALE, COWEN & BULKLEY,
Attorneys for the Defendant The Central National Bank of Boston, 25 North Pearl Street, Albany, N. Y.
CENTRAL NATIONAL BANK,
By CHAS. H. ALLEN, *President.*

HENRY D. HYDE, *Of Counsel.*

48 CITY OF BOSTON, } ss:
County of Suffolk, State of Massachusetts, }

Chas. H. Allen, being duly sworn, says: That he is the president of the above-named defendant, The Central National Bank of Boston; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHAS. H. ALLEN.

Sworn to before me this fourth day of August, 1887, at Boston, in the county of Suffolk and State of Massachusetts.

CHAS. HALL ADAMS,
Commissioner of the State of New York.

49 "A."

At a special term of the supreme court of the State of New York, held at the supreme court chambers, in the city hall in the city of Kingston and county of Ulster, on the 2d day of April, 1881.

Present: Hon. T. R. Westbrook, justice.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

SUPREME COURT, *Rensselaer County,* } *ss:*

On reading and filing the petition of John W. Van Valkenburgh, Esq., receiver of the Lebanon Springs Railroad Company, verified the 23d day of February, 1881, the order made thereon, under date of March 5th, 1881, appointing James H. Jones, Esq., an expert, to examine the condition of said Lebanon Springs railroad, and to report thereon to the court; the report of James H. Jones, Esq., to the court, dated March 19th, 1881; the orders appointing the receiver herein, dated October 1st, 1880, and December 4th, 1880, in the case of the people of the State of New York against said railroad; the supplemental petition of said receiver and Schedule "A" thereto annexed, verified March 22d, 1881; the notice of motion returnable this day and term, with due admission of service thereon;
50 and it appearing from said papers that the said railroad is out of repair, and said James H. Jones in his report recommends this court to instruct the receiver thereof to put the same in repair as to tracks, ties, bridges, telegraph poles, culverts and road-bed, and after hearing Mr. Edward Newcombe, counsel for said receiver, and Robert E. Andrews, associate counsel, for said motion, and no one appearing thereto, and after mature deliberation thereon, it is—

Ordered, that John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, be and he is hereby authorized and directed to issue, under his hands, receiver's certificates of indebtedness, dated April 2d, 1881, with interest at six per cent. of $500 each, payable in five years, with interest coupons thereon attached, payable on the first day of January and July in each year, in the aggregate amount of $350,000, said certificate to be signed by said John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, consecutively numbered from 1 to 700 inclusive, and a certificate on each thereof, duly signed by one of the officers of the Farmers' Loan and Trust Company of New York City. That said certificates are of the series included in the numbers and amount aforesaid. That said certificates and the interest coupons thereto attached be made payable at said Farmers' Loan and Trust Company in said city of New York.

It is further ordered, that said receiver negotiate said certificates to the amount aforesaid, and with the money arising therefrom said receiver is directed first, to pay and discharge the $25,000, heretofore authorized by an order of this court, dated the 25th day of October, 1880, and duly cancel said $25,000 of certificates, and the interest thereon, and upon said cancellation of certificates that said order of the 25th of October, 1880, be and the same is hereby vacated, and said receiver's right to the issuing of additional or any part of said $25,000 of certificates, as under and by said
51 order directed, is cancelled and he is hereby forbidden to issue any more or any part thereof.

Second. The said receiver is hereby empowered and directed from the moneys arising from said certificates herein authorized to be issued to purchase all necessary materials for repairs to the road, and pay and discharge all necessary expenses incident to the repairs thereof, with all other expenses attending the running and successful management and operating of said railroad, as by the order appointing him receiver herein provides, together with such indebtedness as may be found due claimants by the referee herein named, and for said purpose, it is—

Further ordered, that Hon. Smith Strait, county judge of Rensselaer county, be and he hereby is appointed referee to hear and determine all existing claims against said Lebanon Springs Railroad Company, now filed or hereafter to be filed with said receiver.

It is further ordered, directed and decreed that said receiver's certificates of indebtedness to the amount herein directed to be issued be and the same are hereby declared to be a debt of the receiver, incurred for the benefit and protection of said Lebanon Springs railroad, and its owners and bondholders thereof, which certificates to the amount herein specified, viz., $350,000, are declared and decreed to be a first lien on said railroad bed, tracks, ties, bridges, trestles, culverts, engines, cars, depots and all and every kind of property, either owned by said railroad company or in the possession of the receiver thereof, and are to be recognized as such in any reorganization of the company, or in its consolidation with any other company. And in case of any sale of the said railroad, the property in the hands of the receiver, and the franchises under any decree of the supreme court, these certificates are to be first paid from the first moneys realized thereupon by the receiver,
52 unless sooner paid and cancelled by him from the earnings of the said railroad.

But in case in said railroad the property in hands of the receiver and franchises on any sale thereof does not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates hereinbefore authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver and the franchises assumes as first lien thereon so much thereof as at that time remains outstanding and unpaid, with the interest thereon.

Enter in Rensselaer county.

(Signed) T. R. WESTBROOK,
Justice Supreme Court.

Filed April 4th, 1881.

"B."

STATE OF NEW YORK:

No. 435. Whole issue $350,000. $500.

Lebanon Springs Railroad Company.

Receiver's Certificates of Indebtedness.

This is to certify that there is due to —— —— or bearer, from the receiver of the Lebanon Springs Railroad Company as such receiver, but not personally, the sum of $500, with interest at the rate of six per cent. per annum. The principal sum hereof payable on the 2d day of April, 1886, on the presentation and surrender of this certificate when due at the same place the interest is
53 payable. The interest herein to be paid on the presentation and surrender at the office of the Farmers' Loan and Trust Company, in the city of New York, of the annexed coupons as they severally become due.

This certificate is one of a series of the same denomination, not to exceed in the aggregate the amount of $350,000, issued under authority of an order of the supreme court of the State of New York, made at a special term thereof, held at the city hall, in the city of Kingston, county of Ulster, on the 2d day of April, A. D. 1881, and duly filed and entered with the clerk of Rensselaer county on the 4th day of April, A. D. 1881, a certified copy whereof is filed with the trust company heretofore named, which certificates to the amount of $350,000 are declared to be a debt of the receiver for the benefit and protection of the said Lebanon Springs railroad property, its owners and bondholders thereof, and to a first lien on said railroad bed, tracks, ties, bridges, trestles, culverts, engines, cars, depots and all and every kind of property either owned by said railroad company or in possession of the receiver thereof, and are to be recognized as such in any reorganization of the company or its consolidation with any other company, and in case of any sale of the said railroad and the property in the hands of the receiver and the franchises, under any decree of the supreme court, these certificates are to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and cancelled by him from the earnings of the said railroad.

But in case said railroad, the property in the hands of the receiver and franchises, on any sale thereof, do not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates authorized to be issued by said order, then the purchaser of said railroad and franchises and property in the hands of the receiver is to assume said certificates as a first lien thereon,
54 or so much thereof as at that time remain outstanding, with interest.

In witness whereof, I have signed this certificate as such receiver, but not personally, this second day of April, A. D. 1881, at Albany, N. Y.

J. W. VAN VALKENBURGH,

As Receiver of the Lebanon Springs Railroad Company.

Coupons attached.

Coupon.

Coupons. No. 2.

The Lebanon Springs Railroad ($15) Co.

Receiver's Certificate of Indebtedness.

The holder hereof is entitled to fifteen dollars (figure 1 stamped on) on presentation and surrender of this coupon at the office of the Farmers' Loan and Trust Company in the city of New York, being the interest due January 1st, 1882, on certificate No. 1.

J. W. VAN VALKENBURGH, *Receiver.*

(Indorsement:) No. 435. Lebanon Springs Railroad Company. Receiver's certificate of indebtedness, $500. Interest, six per cent., payable January and July at Farmers' Loan and Trust Company, New York city. Trustee's certificate. This is to certify that the within certificate is one of a series of 700 in number of $500 each issued by the receiver of the Lebanon Springs Railroad Company under authority given him by order of the supreme court of the State of New York as in the within certificate set forth. Farmers' Loan and Trust Company, trustee, by R. G. Rolston, president.

55 "C."

At a special term of the circuit court of the United States in equity sitting, held in and for the northern district of New York, at the chambers of the circuit judge in the city of Syracuse, on the 24th day of March, 1887.

Present—Hon. William J. Wallace, circuit judge.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated,

vs.

ROWLAND N. HAZARD, WILLIAM FOSTER, JR., THE NEW YORK, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew Hale, of counsel for complainant, and by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the supreme court of the State of New York, bearing date the 2d day of April,
56 1881, made in an action in said supreme court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the bill of complaint herein, in the hands of the defendants herein, and of any persons

claiming through or under the defendants Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said supreme court on or about the 12th day of January, 1885; and that the complainant The Central National Bank of Boston is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000, of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon, from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said district, requiring the holders of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

That the premises and property described in the bill of
57 complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer in said district by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid; together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other of said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys after the payment of the fees, expenses,

costs and disbursements above mentioned, to the said certificate-holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate-holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale,
58 and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate-holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and William Foster, Jr., pay to the complainant, and to the other of said certificate-holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate-holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and hereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein:

"All the right, title and interest of the said party of the first part (said Lebanon Springs Railroad Company) of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part, from the Chatham
59 Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all lands thereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said party of the first part, now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part, connected with said railroad or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow-ploughs

and scrapers, and all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith, and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining, or which may at any time belong or appertain to the same, as well in law as in equity."

Leave is hereby reserved to the complainant and to the other certificate-holders above referred to, or any of them, to apply
60 upon the foot of this decree for the appointment of a receiver to take immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases.

WM. J. WALLACE.

Supreme Court, Rensselaer County.

AARON R. STEVENS, Plaintiff,
against
THE CENTRAL NATIONAL BANK OF BOSTON, WILLIAM FOSTER, JR., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company, The American Loan and Trust Company, and Others, Defendants.

The defendant The American Loan and Trust Company, answering the plaintiff's complaint, first admits the allegations contained in the first paragraph or subdivision of the complaint, except that it denies that none of the rights, powers and franchises mentioned in said first paragraph have lapsed, been lost, forfeited or expired, but all of the same are still in full force and life and subject to
61 the lien of the mortgage therein mentioned, and that the same will pass in like full force to any purchaser or purchasers on a sale under such mortgage and to any new corporation organized by any such purchaser or purchasers pursuant to the laws of New York.

Second. Admits the allegations of the second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, four-

teenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth paragraphs of the said complaint.

Third. And answering the twenty-fifth paragraph of the complaint, the defendant admits that in or about the month of January, 1885, the said action brought by Marvin Sackett was brought to trial in this court in the county of Rensselaer and judgment was rendered directing a sale of the railroad and property here in the complaint described, subject to the certificate issued by the said Van Valkenburgh, but directing the payment of the interest thereon out of the purchase-money realized upon such sale. That under that judgment said railroad and property was afterwards sold to the defendants Foster and Hazard for the sum of one hundred and fifty-five thousand dollars, which was paid by them; and the usual referee's deed of the said railroad and property was made and delivered to them and they were put into possession of the said railroad and property and remained so in possession until they delivered the possession thereof to the defendant The New York, Rutland and Montreal Railroad Company; and that the said receivership was terminated and the said receiver discharged; but this defendant denies that the said trial was had and judgment rendered therein without the appearance of anybody else except the defendant The Central National Bank of Boston and that the trial was had between the plaintiff Marvin Sackett and the said Central National Bank of Boston only.

62 Fourth. And answering the twenty-sixth and twenty-seventh paragraphs, the defendant denies any knowledge or information sufficient to form a belief as to the allegations thereof.

Fifth. Admits the allegations contained in the twenty-eighth paragraph of the complaint.

Sixth. And answering the twenty-ninth and thirtieth paragraphs of the complaint, defendant denies any knowledge or information thereof sufficient to form a belief.

Seventh. And further answering on information and belief the defendant denies each and every allegation of the complaint not hereinbefore specifically admitted or denied.

Wherefore the defendant demands judgment for the dismissal of the plaintiff's complaint herein with costs.

DELOS McCURDY,
Attorney for Defendant American Loan and Trust Company,
2 *Wall Street, N. Y.*

STATE OF NEW YORK, }
City and County of New York, } ss.:

Roland N. Hazard, being duly sworn, says: He is the president of The American Loan and Trust Company, defendant above named, and that the foregoing answer is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

R. N. HAZARD.

Sworn to before me this 23d day of November, 1887.
CHARLES V. YATES,
Commissioner of Deeds, N. Y. City and Co.

63 Supreme Court, Rensselaer County.

AARON R. STEVENS, Plaintiff,
against
ROWLAND N. HAZARD and WILLIAM FOSTER, JR., and Others,
Defendants.

The defendants Rowland N. Hazard and William Foster, Jr., for their separate answer to the plaintiff's complaint herein—

First. Admit the allegations of the first paragraph of the plaintiff's complaint, except that they expressly deny the allegation that none of the rights, powers and franchises mentioned therein have lapsed, been lost, forfeited or expired, but all of the same are still in full force and life, and subject to the lien of the mortgage therein mentioned, and will pass in like full force and life to any purchaser or purchasers on a sale under such mortgage and to any new corporation organized by such purchaser or purchasers pursuant to the laws of New York.

Second. And further answering, the defendants admit the allegations contained in the second, third, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth.

Third. And answering the fourteenth paragraph of the complaint, these defendants deny any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained.

64 Fourth. And answering the fifteenth, sixteenth, seventeenth, eighteenth and nineteenth paragraphs of the complaint, the defendants deny any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained.

Fifth. And answering the twentieth paragraph of the complaint, the defendants admit the allegations thereof, except that these defendants expressly deny upon information and belief that the said order therein mentioned was obtained by collusion between the said Sackett, the said Root and the said transportation company.

Sixth. And answering the twenty-first and twenty-second paragraphs of the complaint, these defendants deny any knowledge or information thereof sufficient to form a belief.

Seventh. And answering the twenty-third and twenty-fourth paragraphs of the complaint, the defendants admit the allegation thereof.

Eighth. And answering the twenty-fifth paragraph of the complaint, these defendants admit the allegations thereof, except that they expressly deny that the said trial therein mentioned was had between the Central National Bank of Boston, and the said Sackett, as the only parties thereto.

Ninth. And answering the twenty-sixth paragraph of the com-

plaint, these defendants admit the allegations thereof, except that they expressly deny that the said suit by said Sackett was brought and conducted not with the intention of realizing the said property for the benefit of the bondholders or any of them or of himself as a bondholder, but collusively and with the intent that he and others should receive large sums of money from the said property
65 under color of the payment of claims, which even if valid were subordinate to said mortgages; and with the intent that said railroad and property should be acquired by others free from the lien of said mortgages, and without realizing anything to the holders of said bonds.

Tenth. And answering the twenty-seventh and twenty-eighth paragraphs of the complaint, these defendants admit the allegations thereof.

Eleventh. And answering the twenty-ninth paragraph of the complaint, these defendants deny the same in each and every allegation thereof.

Twelfth. And further answering, these defendants deny each and every allegation of the complaint not hereinbefore specifically admitted.

Thirteenth. For further answer, these defendants allege upon information and belief that the action brought by said Sackett and referred to in the complaint was brought not only in behalf of himself but in behalf of all other bondholders of the Lebanon Springs Railroad Company similarly situated who held any of the $2,000,000 of the bonds of the Lebanon Springs Railroad Company and who should be entitled to avail themselves of the benefit of that action; and in and by the complaint in said action the said Sackett in behalf of himself and the other bondholders prayed, first, that it might be adjudged that the New York, Boston and Montreal Railway Company had no title to said Lebanon Springs Railroad Company or its franchises or property as against the holders of the bonds issued under the mortgage of $2,000,000, and for whose benefit the said railroad company was purchased.

And that as against the said New York, Boston and Montreal Railroad Company and the receiver of said company, the said bondholders were entitled to hold and possess the said railroad
66 company, its property and franchises. And the said complaint further prayed, among other things, that a receiver of the whole of said property, railroad and franchises might be appointed, with the usual powers and duties of receivers in like cases, until such time as said property and franchises might be sold under a judgment in said action, or a company or corporation formed by the bondholders to run and operate the same, and lastly that said railroad and franchises might be sold for the benefit of the bondholders and for a distribution of the proceeds thereof and for general relief as by the complaint contained in the judgment-roll in said action will if produced more fully appear.

And defendants further allege that in said action John W. Van Valkenburgh was duly appointed receiver of the Lebanon Springs Railroad Company and duly qualified as such. That while the

said Marvin Sackett was the owner of bonds of said railroad company to the amount of $8,700 only, other bondholders representing all or nearly all of the bonds issued by the said Lebanon Springs Railroad Company were interested in, had knowledge of the pendency of said action and were in fact actually represented in said action by attorneys and counsel, and had notice and knowledge of all the proceedings in and connected with said action; that from the time of the commencement of the said action of said Marvin Sackett and down to the entry of the final judgment therein, a period of about five years, it was a matter of public notoriety that the said road was in the hands of a receiver, and that it was finally to be sold for the benefit of the bondholders thereof in pursuance of the prayer of the complaint of said Sackett.

That the trial of said action took place in October, 1884, and judgment was entered therein on the 12th day of January, 1885; the said property and franchises were advertised to be sold on the 31st day of March, 1885, in the village of Greenb[illegible] Rensselaer
67 county, New York, at public auction; that said sale was postponed from time to time until the 12th day of June, 1885, when the sale thereof took place and the same was purchased by these defendants for the sum of $155,000, that being the highest price bid therefor.

And these defendants further answering allege that all of said proceedings in said action down to and including the sale of the said property and franchises, were well known to, understood by, and acquiesced in by all of the bondholders of the Lebanon Springs Railroad Company, and that it was also understood by said bondholders and all of them that the purpose and object of the said action of said Sackett and of the judgment therein was to enforce specifically the judgment and decree and complete the sale provided for in the said judgment and decree in the said action mentioned in the plaintiff's complaint, wherein The Union Trust Company of New York, as trustee, was plaintiff and The Lebanon Springs Railroad Company, The Harlem Extension Railroad Company and others were defendants.

Fourteenth. And these defendants further answering allege that the said property and franchises were purchased by them at such sale and the possession thereof acquired in perfect good faith, and that the price paid therefor under the conditions of said sale was the full and fair value of all of said property and franchises of the Lebanon Springs Railroad Company, and they are advised and believe that as to any bonds issued by the said Lebanon Springs Railroad Company, as well as any bonds issued by the Harlem Extension Railroad Company, as alleged in the said complaint, all the rights of the holders of said bonds in and to any of the property or franchises mentioned in said complaint as belonging to either of said corporations were cut off, barred and forever extinguished by the said judgment and decree, and the sale in pursuance thereof; and that these defendants acquired a good and valid title to the said property and franchises and the whole thereof.

68 Fifteenth. And further answering, these defendants allege, upon information and belief, that when the said John W. Van Valkenburgh was appointed receiver thereof the said Lebanon Springs railroad was without rolling stock and without means of operating its road, and that the receiver's certificates mentioned in the plaintiff's complaint were duly and lawfully issued by said receiver and the proceeds thereof used by him in the purchase of the necessary equipment for said road and in repairing the same; and that the said certificates thereby became and are a first lien upon the said railroad company, its property and franchises, and take precedence of the rights and equities of the bondholders therein.

Wherefore these defendants pray that the complaint of the plaintiff herein may be dismissed upon the merits, and that a decree may be rendered herein establishing the rights of these defendants as the purchasers of said road under the said judgment and decree in the Sackett suit, and that the defendants may have such other and further relief in the premises as may be just and equitable.

JOHN YARD,
Attorney for Defendants Foster and Hazard,
2 *Wall Street, New York City.*

STATE OF NEW YORK, }
City and County of New York, } ss.:

Rowland N. Hazard and William Foster, Jr., being severally duly sworn each for himself, says: That the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WM. FOSTER, JR.
R. N. HAZARD.

Sworn to before me this 22d day of November, A. D. 1887.
CHARLES YATES,
Commissioner of Deeds, N. Y. City and County.

69 Supreme Court, Rensselaer County.

AARON R. STEVENS, Plaintiff,
against
THE CENTRAL NATIONAL BANK OF BOSTON, THE NEW YORK, Rutland and Montreal Railway Company, and Others, Defendants.

The defendants The New York, Rutland and Montreal Railway Company, answering the plaintiff's complaint herein:

First. Denies any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained, except that it admits and avers that under the judgment in the action brought by Marvin Sackett, mentioned in the complaint, the said railroad and property mentioned therein was duly sold to the defendants Foster and Hazard for the sum of $155,000, which was

paid by them; and the usual referee's deed of the said railroad and property was made and delivered to them, and they were put in the possession of the said railroad and property, and remained so in possession until they delivered possession of the same to this defendant; and that by orders of this court the said receivership was terminated and the said receiver discharged.

And except that this defendant admits the allegations of the twenty-seventh and twenty-eighth paragraphs of the com-
70 plaint, and expressly denies each and every allegation contained in the twenty-ninth paragraph of the plaintiff's complaint herein.

Wherefore the defendant prays judgment that the complaint of the plaintiff be dismissed, and that a decree may be rendered herein establishing and confirming the rights of this defendant as the purchaser of said road from the defendants Foster and Hazard, and establishing the validity of the defendants' title to all of the property mentioned in the plaintiff's complaint, and for such other and further relief in the premises as may be just and equitable.

VANDERPOEL, GREEN & CUMING,
Att'ys for Def't New York, Rutland and Montreal Railway Company.

STATE OF NEW YORK, }
City and County of New York, } ss.:

William P. Watson, being duly sworn, says: That he is the secretary of The New York, Rutland and Montreal Railway Company, the defendant above named, and that the foregoing answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WM. P. WATSON.

Sworn to before me this 22d day of November, 1887.
WILLIAM H. CLARKSON,
Notary Public for New York County, N. Y.

71 Supreme Court, Rensselaer County.

AARON R. STEVENS, Plaintiff,
against
THE UNION TRUST COMPANY and Others, Defendants. } Answer.

The joint and several answer of Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund W. Converse, S. Lothrop Thorndike, William F. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting and Eustice C. Fitz, citizens of Massachusetts, added defendants, impleaded with said Union Trust Company and others, defendants, as follows:

First.

I. Admits upon information and belief the allegations of the amended complaint contained therein, in the paragraph numbered

one; but only in so far as such allegations relate to the incorporation of the Lebanon Springs Railroad Company.

II. Further admits on information and belief that on or about the first day of July, 1867, the Lebanon Springs Railroad Company duly executed and thereafter sold its bonds to the amount of two millions of dollars to individuals and to towns, and that to secure the payment of the aggregate principal of said bonds, said Lebanon Springs Railroad Company duly executed its certain mortgage of even date with said bonds to The Union Trust Company, the
72 defendant herein, as trustee for the holders of the said bonds and to secure the payment thereof, and that such mortgage was duly recorded and became and was actually the first lien on all the property and franchises of the said mortgagor, and that such mortgage contained the usual powers of sale in case of default as will appear by reference to the said original mortgage or deed of trust. That said Union Trust Company duly accepted the trusts specified in said mortgage and deed of trust.

III. Admits that on the 22d day of February, 1872, the Union Trust Company of New York began an action in the supreme court of the State of New York to foreclose the said mortgage, executed by the said Lebanon Springs Railroad Company, and also that on or about the 15th day of November, 1872, filed a bil- in the court of chancery for the State of Vermont, to foreclose the said mortgage, made on or about the said 1st day of July, 1867.

IV. Admits the allegations contained in paragraph numbered eleven of the amended complaint down to the beginning of folio 69 thereof, and also the allegation in said eleventh paragraph of the said complaint concerning the sale to Park, and that by direction of the said Park and the said The Union Trust Company of New York the said special master executed and delivered to the said Charles G. Lincoln the deeds alleged in the complaint and that the grantees named in the deeds therein mentioned, to wit, James C. Hull and Charles G. Lincoln and their respective wives, executed and delivered a bond and mortgage as therein alleged and deeds to the New York, Boston and Montreal Railway Company, subject to said mortgage as therein alleged; and the allegations that all such acts of the said Hull, Lincoln, Duncan and Park were done for the sole use and benefit and in behalf of and as agents and trustees for the holders of the bonds issued by the said Lebanon Springs railroad; and that the said mortgage for $5,000,000 had no other con-
73 sideration; but denies any knowledge or information sufficient to form a belief as to whether the said acts were also done for the use of or in trust for the holders of any bonds issued by the Harlem Extension Railroad Company.

V. Admits that the New York, Boston and Montreal Railway Company became insolvent, as alleged in paragraph 13 of the amended complaint, and that defendant, Daniel Butterfield, was appointed by the supreme court of the State of New York receiver of all the property and effects of such railway company.

VI. Upon information, admits the allegations contained in paragraphs 17, 18 and 19 of the amended complaint.

VII. Admits that in the year 1880 an action was brought in this court by one Marvin Sackett, who was the owner of the bonds issued by the Lebanon Springs Railway Company to the amount of eight thousand seven hundred dollars, such bonds being a part of the two million dollars issue secured by a mortgage made by said Lebanon Springs Railroad Company to the Union Trust Company of New York. That such action so brought by the said Root was a representative suit in which the plaintiff Sackett represented all persons similarly situated to himself and sued in behalf of all such persons and for their benefit; and The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, were the original parties defendant, and that such original parties defendant comprised both the parties in possession of the property of the said Lebanon Springs Railway Company and the parties having any recorded title to possession of such railway property, and no
74 other persons, and that in such action one John W. Van Valkenburgh was duly appointed by this honorable court the receiver of the property of such Lebanon Springs Railroad Company, and thereafter qualified as such receiver, pursuant to such order of appointment, and entered into the actual possession of such property and the discharge of the trust created by this honorable court.

VIII. Believes that during such possession of Van Valkenburgh this honorable court authorized him as such receiver to emit certain receiver's certificates to the aggregate amount of $350,000. That such receiver's certificates were negotiated to divers persons and corporations, and were made and were a lien on all the property intended to be the subject-matter of this action, and were such lien both by the terms of their said emission and the authority of this honorable court, as well as by the judgment, order and decree hereinafter alleged.

IX. Admits the allegations contained in paragraphs numbered 23 and 24 of the amended complaint.

X. Admits, upon information, that in or about the month of January, 1885, the said representative action instituted by Marvin Sackett was duly and regularly brought to a trial thereof in this court, in the county of Rensselaer, and that it proceeded to judgment, which judgment is hereunto annexed and made a part hereof as Exhibit A; and admits further that under the said judgment and decree the property therein described and intended to be the subject of this action was afterwards duly sold to the defendants Hazard and Foster for the sum of one hundred and fifty-five thousand dollars, which sum was actually paid by them, according to the direction of this honorable court, and that thereupon the usual referee's deed of the said railroad and property was duly
75 made and delivered to them, and they were put in actual possession of the said railroad and property and remained so in possession until they delivered up possession of the same to the defendant The New York, Rutland and Montreal Railway Com-

pany, and that by order of this court to that end made said receivership was thereupon duly discharged and possession was duly delivered by such receiver to said purchasers.

XI. Admits that the defendant The New York, Rutland and Montreal Railway is a corporation organized and existing under and pursuant to the laws of the State of New York, and that prior to the first day of July, 1885, it executed and delivered to the defendant, The American Loan and Trust Company, which is also a corporation, in due form of law, a mortgage upon all the property conveyed to the said Hazard & Foster, as aforesaid, and by them to such New York, Rutland and Montreal Railway Company, in order to secure an issue of first-mortgage bonds of said last-named railway company, ninety-three of which are owned by these answering defendants, and were acquired by purchase in good faith without notice of anything affecting their security and for full face value actually paid for the same. That the only value such bonds have is the security afforded by the mortgage of said New York, Rutland and Montreal Railway Company, unless it be by reason of the matter and things hereinafter alleged.

XII. Admits the allegations contained in the twenty-eighth paragraph of said amended complaint substantially as alleged, but with reference to the proper proof by documentary evidence of such facts so alleged, and further saith that these defendants and their associates through their trustee, The American Loan and Trust Company, stood ever ready and willing to pay the sum so directed to be paid by the decree of the circuit court of the United States
76 and to be subrogated to the lien of the receiver's certificates therein described, provided such certificates were as defendants then believed, a lien on the premises described in the amended complaint and the mortgage securing the bonds of these defendants only subordinate to such lien.

Second.

And for further answer to the amended complaint, these defendants deny any knowledge or information sufficient to form a belief concerning any of the allegations of such amended complaint not hereinbefore specifically admitted or controverted.

Third.

And for a further answer to the amended complaint, the joint answer of these defendants saith, that the action above referred to, in which Marvin Sackett was plaintiff, was brought not only in behalf of himself, but in behalf of all the bondholders of the Lebanon Springs Railroad Company, similarly situated; and as these defendants are informed and believe, such action was so maintained in and for the benefit of all other bondholders of the Lebanon Springs Railroad Company, or with the consent, acquiescence, participation, privity or knowledge of such other bondholders, and by reason of such acquiescence or knowledge all such other bondholders are now estopped from maintaining the contrary.

That in said action the parties defendant were both the parties in

actual possession of the said railway property and the persons or corporations having a record or legal title to such possession. That such action was maintained in the manner it was, by the advice of able counsel of the State of New York, licensed to practice by the authority of such State. That in such action a receiver of the corporate property aforesaid, one John W. Van Valkenburgh, was duly and regularly appointed by the order of this honorable court,
77 as will appear by the orders in such action; and said Van Valkenburgh was also appointed such receiver in a certain other action in which The People of the State of New York were plaintiffs, and The Lebanon Springs Railroad Company was defendant, and as such receiver was authorized to emit, and did emit, the certificates fully alleged in the answer of the defendant Central Bank, interposed in this suit.

That during the pendency of such action, which embraced a long period of years, various justices of this honorable court made orders in the said cause, and vario[illegible] mesne and interlocutory proceedings were had therein before th[illegible] fficers of this honorable court duly delegated and appointed f[illegible] such end and in pursuance of law. That many such proceedin[illegible] were duly published in the public prints or newspapers, and others, such as the notices of the investigation concerning such receivership by the legislature of the State of New York, were mentioned at length in many newspapers, so that the proceedings in said action must have come to the knowledge of this plaintiff or his predecessor in interest, and to all other persons, actual or constructive, parties to this action, long prior to the public judicial sale hereinafter referred to. And so it was the railroad commissioners of this State made various reports upon the said road, and that the said William V. Reynolds, receiver as aforesaid, brought an action in the supreme court of this State to test the validity of the said receiver's certificates issued by his predecessor, which said action was dismissed by the court, as will more fully appear by the papers in the said action, which defendants are willing to produce as the court shall direct. This defendant further says, upon information and belief, that when said John W. Van Valkenburgh was appointed receiver, said Lebanon Springs railroad was without rolling stock, and incapable of being operated, or of running its cars; and that to protect and preserve the said property, and save it from destruction, the court immediately
78 ordered the issuing of $25,000 of receiver's certificates, money upon which the receiver obtained and expended upon the said road, and then made a report to the court in connection with one James H. Jones, a civil engineer, showing the further needs of the road; and that thereupon, in said action, an order was duly made the 2d day of April, 1881, at a special term of this court, held at the city hall in the city of Kingston, of which order a copy is annexed to the answer of the Central Bank herein, and marked "A," and which these defendants pray may be also taken as a part of this answer; that in pursuance of said order, the said John W. Van Valkenburgh, as receiver as aforesaid, issued his certificates, each for the sum of $500, amounting in the aggregate to $350,000, which

certificates were in the form alleged in the answer of said Central Bank; that the said certificates were duly issued and sold for the purposes named in said order, and the avails thereof were used by said receiver for such purposes, and that without this money said railroad could not have been operated, and that by its operation the mails were carried, and the public were accommodated in addition to protecting the property of the bondholders.

That before the sale hereinafter alleged, and subsequent to the emission of such receiver's certificates, it was currently given out by the bondholders of said two million mortgage, that the actual value of the said railway property, upon which said certificates were made a lien, was not much in excess of the aggregate of said certificates.

That upon the 12th day of January, 1885, a judgment was duly rendered in the said action so brought by Sackett, as aforesaid, a copy of which judgment is attached to this answer and made a part hereof as Exhibit "A."

That pursuant to such judgment the said property and franchises therein referred to were duly sold to the defendants William Foster,
Junior, and Rowland N. Hazard, subject to the payment of
79 the undue principal and interest upon the $350,000 of certificates emitted by said receiver as aforesaid, and upon such terms were thereafter actually conveyed to said Hazard and Foster under and pursuant to an arrangement with a syndicate consisting of these answering defendants and other persons similarly situated, to wit, that said Hazard and Foster should thereafter forthwith convey the said property to the New York, Rutland and Montreal Railway Company, a corporation entitled to take the same, and that these answering defendants and such other persons so similarly situated should purchase the first-mortgage bonds of such New York, Rutland and Montreal Railway Company, secured by a mortgage to the American Loan and Trust Company, and pay out of the proceeds thereof, to the proper disbursing officer entitled by authority of this honorable court to receive the same, the sum of one hundred and fifty-five thousand dollars, or thereabouts, which said sum was the proceeds of such purchase of the said first-mortgage bonds of the said New York, Rutland and Montreal Railway Company. That thereafter, pursuant to such arrangement, these defendants and others similarly situated did purchase said bonds as aforesaid and did pay the said one hundred and fifty-five thousand dollars in whole or in part into court under and pursuant to said decree, Exhibit "A," and thereafter said Hazard and Foster duly conveyed said property to the said New York, Rutland and Montreal Railway Company, which company had theretofore duly made its mortgage, conveying in appropriate terms all after-acquired property and the lien of which mortgage immediately attached to the said property so conveyed by Hazard and Foster, as aforesaid.

That the said sum of one hundred and fifty-five thousand dollars was, in part, to wit, upwards of the sum of fifty-three thousand
dollars, or thereabouts, disbursed to the defendants, The
80 Central National Bank of Boston, Peter Butler as receiver of

the property of the Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company, George T. Bonner, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Peter W. French, Louisa M. G. Wright, Samuel R. Dickson, Mary Gilbert, Sarah Gilbert, and John H. Van Tine, as accrued interest on the receiver's certificates aforesaid respectively held by them.

And these defendants, further answering, say that the said New York, Rutland and Montreal Railway Company entered into possession of the said granted premises and the management of said railroad company, and thereupon expended in good faith the balance of the money of these defendants and other bondholders of the said New York, Rutland and Montreal Railway Company in betterments and improvements of the said property and in the preservation thereof. That meanwhile this plaintiff and the Union Trust Company of New York, well knowing all that is now complained of by plaintiff, stood by and permitted the said sale to said Hazard and Foster, and permitted the New York, Rutland and Montreal Railway Company to hold itself out to the public as owner of the said railway property, and to proceed to protect, better and preserve it with the moneys of these defendants and others similarly situated, whereby in equity the plaintiff and all others similarly situated ought to be estopped from maintaining this suit; at least, without offering to allow the money actually paid by these answering defendants for such betterments, improvements, and conservation of the said granted premises.

That the New York, Rutland and Montreal Railway Company has no property other than the said railway and appurtenances granted as aforesaid to it by Hazard and Foster, and that neither the said New York, Rutland and Montreal Railway Company, nor the defendant American Loan and Trust Company, make any
81 claim to the money of these answering defendants in the events prayed to be taken into consideration by the prayer of these defendants. That such expenditures aforesaid were made for the benefit of these answering defendants and their associate bondholders, and for no other person soever, and that these defendants are entitled, in the event prayed, to receive the same back directly.

Wherefore, these defendants pray:

First. That the complaint may be dismissed with the usual costs; or

Second. That in default thereof that plaintiff be decreed and adjudged to pay to these defendants the amount of their money expended in the protection, conservation and betterments of the railway property and its appurtenances as aforesaid.

Third. And that these defendants have judgment against their co-defendants, The Central National Bank of Boston, Peter Butler as receiver of the property of the Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company, George T. Bonner, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Peter W. French, Louisa M. G.

Wright, Samuel R. Dickson, Mary Gilbert, Sarah Gilbert and John H. Van Tyne, for the amounts paid them severally as interest on the certificates of the receiver of the Lebanon Springs Railroad Company respectively held by them at the time of the judicial sale to Hazard and Foster aforesaid.

Fourth. And that it may be decreed to be referred to a master or referee to determine the amounts to be so paid to these answering defendants, and that the amounts so determined may be directed to be paid by a final judgment in accordance therewith, and
82 that these defendants may have such other and further relief in the premises as may be consistent with equity.

CRANE, LOCKWOOD & FOWLER,
Attorneys for Defendants Answering Hereby,
No. 41 Wall Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Robert Ludlow Fowler, of said city, one of the attorneys for the defendants, Royal E. Robbins, Barthold Schlesenger, Francis Bartlett, Edmund W. Converse, S. Lothrop Thorndike, William F. Glidden, Ezra F. Baker, Philip H. Moen, H. A. Whiting and Eustice C. Fitz, being duly sworn, says: That he is such attorney, and resides in the city of New York; that the foregoing answer is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the grounds of his belief as to all matters therein, not stated upon his knowledge, are as follows: That he has possession of certain documentary evidence, and has examined the records and proceedings of the court in the matter and suits mentioned in said answer and corresponded with and personally questioned the persons upon whom the said defendants rely as witnesses to establish the truth of the allegations of said answer.

Deponent further says that the reason why this verification is not made by said defendants or either of them is that said defendants are not, nor is either of them, within the county of New York.

ROB'T LUDLOW FOWLER.

Sworn to before me this 28th day of January, 1888.

[L. S.]

GEORGE F. NOYES,
Notary Public, N. Y. County.

83 EXHIBIT A.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Co., Defendants. } Jan. 12, 1885.

This action having been brought to trial by the court (a trial by jury having been duly waived), and a decision having been rendered for the plaintiff and filed, whereby it appears that the purchase of the property, franchise and rights of the Lebanon Springs Railroad Company, by William Butler Duncan, as stated and alleged in the complaint herein and as found by the said court, was for the benefit of the bondholders of the said railroad company and vested the right to a title thereto in the said bondholders; that the conveyance of said property and franchise, by the referee who sold the same, as alleged in said complaint and found by the court, to James C. Hull, in accordance with the directions of the said Duncan, vested the title thereunto in said Hull, as trustee of the said bondholders, in whom the beneficial interest still remains; that the conveyance by the said Hull and his wife to the New York,
84 Boston and Montreal Railroad Company was wholly ineffectual to pass any title to said railway company or to divest the said bondholders of any right therein; that the title to and the beneficial interests in said Lebanon Springs Railroad Company was, continued to be, and is in the bondholders of said Lebanon Springs Railroad Company; that the said property, franchises and powers of the Lebanon Springs Railroad Company, as described in and enumerated in the said mortgage, made by the said The Lebanon Springs Railroad Company to the Union Trust Company of New York, and all the right, title and interest of any and of all the parties to this action, should be sold at public auction according to the rules and practice of the court in actions for the foreclosure of mortgages, and that all the parties in this action be barred and foreclosed of all right, title and interest in and to such property, powers and franchises, or any part thereof. And it appearing that during the pendency of this action the whole of said property, franchises, rights and powers has, by the order of this court duly made, been in the possession of a receiver duly appointed by such order, and that the same is still in the possession of such receiver, that an accounting of such receiver has been had by and before a referee appointed by the order of the court to hear, examine and report in respect to the accounts and receipts and disbursements and the indebtedness of such receiver, and also to examine and report in re-

gard to all claims for compensation for services by any party or parties that might or should be a charge or lien upon any of the said property in the hands of such receiver. And said referee having made in due form his report thereon, as required, and such report having been duly confirmed by the order of this court. Now, on motion of McClellan & Brown, attorneys for the plaintiff, and on hearing Mr. Delos McCurdy, of counsel for the plaintiff, and Mr. Hamilton Harris, of counsel for the defendants, who have appeared in this action, and also as counsel for the bondholders of the Leb-
85 anon Springs Railroad Company, who have not been made parties to this action by name, and on hearing Mr. Henry D. Hyde and Mr. Matthew Hale of counsel for certain parties claiming to be holders of certain certificates issued by John W. Van Valkenburgh, as receiver, under the order made in this action, dated April 2d, 1881, namely, for the Central National Bank of Boston, Massachusetts, to the amount of two hundred and fifty thousand dollars, and for the Massachusetts Mutual Life Insurance Company of Springfield, Massachusetts, to the amount of fifty thousand dollars, and for Linus M. Price, as receiver of the Pacific National Bank of Boston, Massachusetts, to the amount of nineteen thousand dollars.

It is adjudged and decreed that the purchase by William Butler Duncan of all and singular, the property, rights, powers and franchises of the Lebanon Springs Railroad Company, at the foreclosure sale thereof by Charles S. Fairchild, as referee, on the 25th day of January, 1873, was for the benefit of the plaintiff and other bondholders of the said The Lebanon Springs Railroad Company, and vested the right to a title thereto in such bondholders.

And it is further adjudged and decreed that the conveyance by the last-mentioned referee to James C. Hull of all such property, rights, franchises and powers, in accordance with the directions of such purchaser, Duncan, merely vested the title thereto in said Hull, as trustee of the aforesaid bondholders, in whom the beneficial interest still remains.

And it is further adjudged and decreed that the conveyance by said James C. Hull and his wife of the said property, powers, rights and franchises to the New York, Boston and Montreal Railway Company was ineffectual to pass any title to said railway company or to divest the said Lebanon Springs Railroad Company bondholders of any right therein.

And it is further adjudged and decreed that the title to
86 and the lawful interest in the said Lebanon Springs Railroad Company, its rights and franchises, and property was, and continued to be, and is in the bondholders of the said Lebanon Springs Railroad Company.

And it is further adjudged and decreed that the certificates of indebtedness, issued by John W. Van Valkenburgh, late receiver of the Lebanon Springs Railroad Company, under and by virtue of an order of the court made in this action, dated on the second day of April, 1881, amounting in the aggregate to three hundred and fifty thousand dollars, be, and the same are hereby ratified and confirmed and declared to be a first lien on said railroad and its

property as provided in and by said order of April 2d, 1881, and as stated in said certificates for the amounts of principal and interest unpaid thereon, subject, however, to the payment of costs and expenses hereinafter provided for, and referred to in the order confirming the report of Judge Cadman, referee.

Also all unpaid claims and demands made or incurred by the receiver of said railroad company, as found due by the report of Hon. John Cadman, confirmed by an order of the court, dated October 25th, 1884, as such, or in consequence of his action as receiver, or of any order of this court; and the same are decreed to be a first lien on the said property, and effects of said railroad in the hands of, or under the control of the court, as directed by the order confirming the report of the Hon. John Cadman, referee herein.

And it is further adjudged and decreed that the said property, franchises and rights of the Lebanon Springs Railroad Company, as described in, and enumerated in the mortgage made by said company to the Union Trust Company of New York, as hereinafter particularly described and set forth, and all the right, title and interest of any or all the parties in this action, therein and thereto, including all the property and assets in the hands of the receiver in this action, appertaining thereto, whereon the same may be sold at public auc-
87 tion, in the county of Rensselaer, by George McClellan, Esq., of Chatham, Columbia county, N. Y., referee to whom it is referred to make such sale for the benefit of the first-mortgage bondholders of the said railroad company, issued July 1st, 1867, for the amount of two million dollars, and that such sale be made subject to the payment of the undue principal and interest of the before-mentioned receiver's certificates; also subject to the unpaid claims and demands made or incurred by the receiver in this action or in consequence of his action as such, or of any order of this court not herein provided for and paid by the referee pursuant to the provisions of this judgment, and that the purchaser or purchasers of such railroad property and franchise shall take the said railroad property and franchise subject to the unpaid principal and interest on the said referee's certificates; also subject to the before-mentioned claims and demands which shall have remained unpaid, as above stated; and the purchaser or purchasers shall assume as part of the consideration of the said purchase, the payment thereof as above and herewith stated. That the said referee give public notice of the time and place of such sale according to the law and practice of this court in relation to sales in actions for foreclosure of mortgages. That any or either of the parties to this action may purchase at such sale. That the said referee execute to the purchaser or purchasers a deed or deeds or conveyances of the premises and property sold. That out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the plaintiff or his attorneys the sum of two hundred and ten dollars adjudged to the plaintiff's attorneys herein for their costs and disbursements, together with the sum of two

thousand dollars for additional allowance in this action and for services rendered in and about the preservation and care of the trust property by advising and as counsel to the receiver
88 herein and his employés, with interest from the date hereof and not embraced in the report of John Cadman, referee.

And then that said referee further pay, according to the confirmed report of Hon. John Cadman, as aforesaid, the referee in this action as follows:

First. The sum of five hundred and eighteen and $\frac{20}{100}$ dollars due Hon. John Cadman, referee hereinbefore appointed, as referee's fees on report passing receiver's accounts.

Second. The sum of one hundred dollars to E. A. Brett, as an accountant on examination before said Cadman, referee.

Third. To McClellan & Brown, the sum of eight thousand three hundred dollars, balance found due them by report of said Cadman, referee.

Fourth. To Edward Newcomb, the sum of twelve thousand three hundred eighty-six and $\frac{38}{100}$ dollars, balance found due him by said report of said Cadman, for services rendered for said receiver.

Fifth. To Andrews & Edwards, one thousand and eighty-five dollars as found due them for counsel for receiver, as found due *for* said Cadman, referee, in his report.

Sixth. To J. Rider Cady, two hundred and four dollars, found due him for services rendered the receiver by said Cadman, referee, in his report.

Seventh. To Hamilton Harris, two thousand nine hundred and fifty dollars as found due him for services rendered herein for receiver by the report of said Referee Cadman, and the further sum of two thousand dollars for counsel and advice to the receiver herein since the fifteenth day of December, 1883, which
89 amount is hereby fixed by the court to the date hereof for services rendered subsequent to those passed upon by said Referee Cadman.

Eighth. To W. C. Van Alstyne, two thousand two hundred and seventy-three and $\frac{83}{100}$ dollars as found due him for services rendered for receiver as found due by said Cadman, referee.

All the foregoing amounts to be paid with interest from the date hereof.

Ninth. To pay the amount of interest due on the receiver's certificates as found by said Cadman, referee, as existing at the date of his report and such interest as may accrue and become due thereon up to the time of sale under this judgment to the holders thereof, upon the production by them of their several certificates and coupons and all other claims found due by the said referee's report and named in Schedules One and Two in said report. Also all claims accrued or to accrue and unpaid in the running of said railroad by said receiver and his lawful commissions up to the date of the surrender thereof to the purchaser or the purchasers under the sale hereinbefore directed to be made.

And it is further ordered and directed that any surplus produced upon the sale over and above the payments herein specially pro-

vided for shall be brought into court by the said referee to the end that such further order may be made to distribute the same among the persons emitled thereto as shall be just and according to the practice of this court.

And it is further adjudged that the defendants and all persons claiming under them, or any or either of them, be forever barred and foreclosed of all right, title and interest in the premises and property so sold or any part thereof. The following is a description of the premises and property, as contained in the mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, the interest of the parties to this action, and of the
90 bondholders of the Lebanon Springs Railroad Company, in which it is directed to be sold as hereinbefore mentioned:

(Here follows description in the mortgage to the Union Trust Company.)

And it is further ordered that the referee shall sell as a part of the property above described and by a purchase of said sale the purchaser or purchasers shall acquire title to all property held by the receiver in this action and which he holds as such receiver, and the purchaser or purchasers shall have possession of all of said property on the production of the referee's deed.

(Enter.)

T. R. WESTBROOK.

Filed January 27th, 1885, at 10.45 a. m.

SHEPPARD TAPPAN, *Clerk.*

91 New York Supreme Court, County of Rensselaer.

AARON R. STEVENS
vs.
THE UNION TRUST COMPANY OF NEW YORK and Others.

John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, one of the defendants in the above-entitled action, appearing therein by Jennings and Russell, his attorneys, and not waiving but insisting that the complaint in said action does not state facts sufficient to constitute a cause of action against him, answers the said complaint as follows, that is to say:

First. He admits that the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation, under, and by virtue of the laws of the State of New York, by the filing of its articles of incorporation or association on the 25th day of March, one thousand eight hundred and fifty-two, and by the provisions of various general and special acts, passed by the legislature of the State of New York, as alleged in the first paragraph of said complaint, but whether the said acts are correctly referred to in said paragraph, this defendant has no information, and leaves the plaintiff to make such proof in respect thereto as he may be advised. And this defendant further admits, that by virtue of vari-

ous acts of said State, under which the said company was organized or created, and of which it was entitled to claim the benefit,
92 and also by virtue of certain acts, passed by the legislature of the State of Vermont, the said company became vested with all the powers and franchises of corporations, and with certain special powers and franchises as stated in the first paragraph of said complaint, but whether the said acts, of which the said company became entitled to claim the benefit, are correctly enumerated in said complaint, or whether the various powers and franchises which the said company received, under and by virtue of such acts, are fully stated in said complaint, this defendant has no knowledge, and he leaves the plaintiff to make such proof in respect thereto as he may be advised. And this defendant further admits that said company was duly organized, and its road duly located, and the construction thereof commenced; that on or about the 20th day of August, 1867, the Vermont and New York Railroad Company, by its deed of conveyance of that date, in all respects duly authorized, acknowledged and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebanon Springs Railroad Company, the said Vermont and New York railroad, located as stated in said complaint, with all its privileges and appurtenances, and all the rights and franchises of said Vermont and New York Railroad Company, and that the said Lebanon Springs Railroad Company constructed the said railroad from Chatham to Bennington, as described in said complaint, including the completion of the Vermont and New York railroad, and completed the same, and opened it to the public early in the year 1869, and operated the said railroad, as stated in the first paragraph of said complaint; and that said company also became possessed and the owner of the property, powers and franchises described in the first paragraph of said complaint; but this defendant, while he admits that none of the above-mentioned rights, powers and franchises have lapsed, been lost, forfeited or expired, and that all the same are in full force, still he says that it is not true, and he denies
93 that the same are subject to the lien of the mortgage, in the first paragraph of said complaint mentioned, or will pass in like full force or life to any purchaser or purchasers on a sale under such mortgage, or to any new corporation organized thereunder, pursuant to the laws of New York.

Second. This defendant further admits the allegations contained in the second, third, fifth and sixth paragraphs of said complaint.

Third. This defendant has no knowledge or information sufficient to enable him to form a belief as to the truth of the allegations contained in the fourth and seventh paragraphs of said complaint, and he therefore denies the same.

Fourth. This defendant further admits the allegations contained in the eighth paragraph of said complaint, except that he says that he has no knowledge or information sufficient to enable him to form a belief as to the date when the Lebanon Springs Railroad Company, therein mentioned, first made default in the payment of the

interest upon its bonds, and leaves the plaintiff to make such proof in respect thereto as he may be advised.

Fifth. And this defendant further admits the allegations contained in the ninth, tenth and eleventh paragraphs of said complaint, except so far as the said allegations relate to an alleged foreclosure of the mortgage made by the Harlem Extension Railroad Company, in a suit in the supreme court of the State of New York, and as to that he says, that as he is informed and believes, it is not true, and he therefore denies that any action was commenced in said court, as therein stated or otherwise, to foreclose said mortgage, or that due notice of the pendency of any such action was ever filed in the offices of the clerk- of the counties of Rensselaer and Columbia, or either of them, or that any defendants in any such
94 action were ever duly, or regularly, or at all served with the process of said court, or subjected to the jurisdiction thereof, or duly or regularly appeared in such action prior to the first day of May, 1872, or otherwise howsoever. And he further denies that judgment was ever rendered or entered in that court in any such action to foreclose said mortgage of the Harlem Extension Railroad Company, or that the property or franchises therein described were ever sold under any such foreclosure, and while he admits that the property and franchises described in the mortgage made by the Lebanon Springs Railroad Company were sold under the judgment, in the eleventh paragraph of said complaint referred to, on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by said court in that behalf at Greenbush, in the county of Rensselaer, for the price of one hundred thousand dollars, he denies upon his information and belief that such property and franchises were so sold to the defendant, William Butler Duncan, and on the contrary he avers that they were so sold to the defendant, James C. Hull, and he further admits and avers that the said referee thereupon executed and delivered to the defendant, James C. Hull, his deed of the said road, property and franchises, bearing date the 25th January, 1873, and that said deed was duly recorded in the clerks' offices of Rensselaer and Columbia counties, but whether said deed was so executed and delivered by direction of the defendant Duncan, or the Union Trust Company of New York, as alleged in said paragraph, this defendant has no knowledge or information sufficient to enable him to form a belief, and he therefore denies the same; and further answering the said paragraphs, this defendant further says that while he admits that under and in pursuance of the decrees in the court of chancery in the State of Vermont, in the eleventh paragraph of the said complaint referred to, the road, property, powers and franchises within the State of Vermont therein mentioned were by Daniel McEowen, a special master
95 in chancery, appointed by the said court for that purpose, on the 20th January, 1873, sold; he says, that he is informed and believes, it is not true, and he therefore denies that they were so sold to Trenor W. Park, of Vermont, for the sum of twenty-five thousand dollars, or any other sum, and on the contrary he avers that they — so sold to Charles G. Lincoln, for the sum of fifty thou-

sand dollars, and he further admits and avers that the said special master thereupon executed and delivered to the said Lincoln, deeds of said road, property, powers and franchises, bearing date the said 20th January, 1873, and that said deeds were duly recorded in the office of the clerk of the county of Bennington, Vermont, on the 22d January, 1873, but upon his information and belief, he denies that the said deeds were so executed or delivered by direction of the said Trenor W. Park, or of the said Union Trust Company of New York, and this defendant further denies that no part of either of said sums of one hundred thousand dollars and twenty-five thousand dollars have ever been paid as alleged in folio 69 of said complaint, and, on the contrary, he avers that the sum of one hundred thousand dollars, which was the consideration of said conveyance by the referee in the State of New York to the defendant Hull, was duly paid prior to such conveyance, and that the sums of fifty thousand dollars which were the considerations for the conveyances in the State of Vermont to said Lincoln, were duly paid by him prior to such conveyances. And this defendant further admits and avers that on the 28th January, 1873, the said Hull and Lincoln executed and delivered to the defendant, Duncan, and the said Trenor W. Park, a bond conditioned for the payment of five millions of dollars, on or before the first of August, 1873, with interest at seven per centum per annum, and also that they and the defendant, Melissa A. Hull, executed and delivered to said Duncan and Park a mortgage to secure the payment of the same, conveying all
96 the roads, property, powers and franchises of the Harlem Extension Railroad Company, including those of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, in both States, as in said complaint set forth, and that said mortgage was recorded in the offices of the clerks of Rensselaer and Columbia counties, on the 14th February, 1873, and in the clerk's office, in Bennington county, Vermont, on the 1st May, 1873, and this defendant further avers that the said decrees of foreclosure of the mortgages made by the Lebanon Springs and Harlem Extension Railroad Companies, and the conveyances thereunder, to the said Hull and Lincoln, and the said bond and mortgage made by the said Hull and Lincoln to said Duncan and Park, mentioned in said complaint, are a complete and absolute bar to the pretended cause of action alleged by the plaintiff herein, and this defendant further admits that on the 30th of January, 1873, the defendants, Hull and wife, and Lincoln, by separate deeds executed and delivered by them, conveyed the said roads, property and franchises, situated in the State of New York and in the State of Vermont respect*fully* to the New York, Boston and Montreal Railway Company, subject, however, to the said mortgage to Duncan and Park, and also to the said $500,000 prior mortgage on the old Bennington and Rutland railroad, as stated at folios 71 and 72 of said complaint; but he says that as he is informed and believes, it is not true, and he therefore denies, that such conveyances were without any consideration, or that such acts of the said Hull, Lincoln, Duncan or Park were done for the sole or any use or benefit, or in be-

half of, or as agents or trustees for the holders of the bonds issued by the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company as aforesaid, by virtue of agreements validly made by them to so act, or otherwise howsoever, or that the said mortgage for $5,000,000 had no other consideration as alleged at the end of the eleventh paragraph of said complaint.

97 Sixth. This defendant has no knowledge or information sufficient to enable him to form a belief as to the truth or correctness of the allegations in the twelfth paragraph of said complaint as to the construction, purpose and effect of the said $5,000,000 mortgage, or of the consolidation agreement, by which the New York, Boston and Montreal Railway Company was formed, or of the other agreements and arrangements by which the property of the said Harlem Extension Railroad Company was to be acquired by the said New York, Boston and Montreal Railway Company, or of the agreement made on or about February 11th, 1873, between the said New York, Boston and Montreal Railway Company and the said Duncan and Park, and he therefore refers to the said mortgage, agreements and arrangement in writing for the contents and the true intent and meaning thereof, and he denies each and every allegation in said twelfth paragraph of the complaint contained which is in anywise inconsistent with the written mortgage and agreements themselves. But he admits, upon his information and belief, that the moneys to be paid by the New York, Boston and Montreal Railway Company to secure the payment and discharge of the aforesaid $5,000,000 mortgage were to be so paid to the defendant Duncan alone, who was to have the custody of said moneys, and to disburse the same, and he further admits, upon his information and belief, that the said bond and mortgage, together with the satisfaction thereof in writing, were placed in the custody of Jesse Seligman and John Crosby Brown, two of the trustees in said agreement mentioned, who were in accordance with the provisions of the said agreements and arrangements, and were authorized by power of attorney to receive and endorse upon said bonds the payments that should be made thereon, and upon full payment thereof, if within the time stipulated, to file the said satisfaction piece, and thus discharge said mortgage of record, but in case of the failure by said company to pay the full amount due on or before

98 the 1st day of August, 1873, to redeliver the bond and mortgage and satisfaction piece to the mortgagees, and he further admits, upon his information and belief, that in and by said agreements it was further provided that if the said company should fail to pay, for the reasons therein mentioned, the amount due upon said bond and mortgage, on or before August 1st, 1873, that then under certain conditions the payment of such should be extended for eighteen months from the said 1st day of August, 1873, but he denies that the said conditions were ever fulfilled, or that the payment of such sum was so extended.

Seventh. And this defendant further admits, upon his information and belief, that the said New York, Boston and Montreal Railway Company, through the disbursement trustees, paid to the

defendant Duncan the sum of about $807,077.05, as stated in the thirteenth paragraph of said complaint, on account of the moneys due on said bond and mortgage, and that the said mortgage long since, and on or before February 1st, 1875, became wholly due and payable, and that the said company wholly failed to pay on or before said last-mentioned day, or at any other time, the remainder being much the larger part of the sum due upon said bond and mortgage, and has never paid the same nor any part of the same, and has never completed its railroad, and has become insolvent and abandoned its undertaking, and is wholly unable to pay the same, or any part thereof, and that a receiver of its property and effects has been appointed, as stated in the said thirteenth paragraph of said complaint, and that he has never taken any action whatever toward completing said railroad, or carrying on its enterprise, or fulfilling its obligations, but has wholly failed to do so.

Eighth. This defendant has no knowledge or information
99 sufficient to enable him to form a belief as to the truth of the allegations contained in the fourteenth paragraph of said complaint, although he believes the allegations to be true substantially, as therein set forth, and he leaves the plaintiff to make such proof in respect thereto as he may be advised.

Ninth. This defendant says that as he is advised and believes it is not true, as stated in the fifteenth paragraph of the complaint, and he therefore denies, that by reason of the insolvency of the New York, Boston and Montreal Railway Company, or its failure or inability to complete and operate its railroad, or to pay the amount due upon said $5,000,000 mortgage, the said company has no title to the said Lebanon Springs railroad, its franchises or property, as against the holders of the bonds issued, as stated in said complaint, under said mortgages for the $2,000,000 and for the $4,000,000, or that as against the said New York, Boston and Montreal Railway Company, or the receiver of said company, or otherwise, howsoever, the said bondholders are entitled to hold or possess said railroad, its property or franchises, or to have the same sold for their benefit, or that the plaintiff or the other bondholders are now entitled to the benefit or advantage of the said $5,000,000 mortgage, or that the said Duncan holds the same for them, or that they are entitled to have the same enforced for their benefit.

Tenth. This defendant admits the allegations contained in the sixteenth paragraph of said complaint, except that he says that as he is advised, and believes it is not true, and he therefore denies that the plaintiff or other like bondholders are entitled to have the sale therein mentioned proceeded with for their benefit or on their behalf.

Eleventh. And this defendant says, that as he is advised and believes it is not true, as stated in the seventeenth paragraph
100 of the complaint, and he therefore denies that the defendant Duncan or this defendant have no title to or interest in said mortgage executed by the said Hull and Lincoln for $5,000,000, save their interest as holders of the bonds of the Lebanon Springs Railroad Company.

Twelfth. This defendant admits, upon his information and belief, that the allegations contained in the eighteenth and nineteenth paragraphs of said complaint are true substantially as therein set forth.

Thirteenth. This defendant is informed and believes and therefore admits that in or about the year 1880 an action was brought in this court by the defendant Marvin Sackett against the parties mentioned in the twentieth paragraph of said complaint, and he believes that the allegations in said twentieth, twenty-first and twenty-third paragraphs of said complaint, in respect to the proceedings in said suit, are substantially true, but he is not informed as to the various steps, proceedings and orders taken and made in said suit, and he therefore leaves the plaintiff to make such proof in respect thereto as he may be advised. But he admits and avers upon his information and belief that said Van Valkenburgh, as receiver, signed and issued all of the certificates mentioned in the twenty-first paragraph of said complaint, and parted with the same in such a way that he realized for the whole of them in cash very much less than the face value thereof, but as to the precise sum this defendant does not know, and therefore is unable to state. This defendant has no knowledge or information sufficient to enable him to form a belief as to the truth of the allegations in folios 92 and 93 of said complaint, as to the claims made by William V. Reynolds, as receiver, and as to the parties who now hold said certificates, or the circumstances and agreements under which they obtained the same, and he leaves the plaintiff to make such proof in respect thereto as he may be advised.

101 Fourteenth. This defendant further admits and avers that out of such sum as the said Van Valkenburgh received for the said certificates, the amount of which this defendant does not know, said Van Valkenburgh paid large sums, but how much he is unable to state, to persons who presented claims, or pretended claims to him, but who if their claims were valid were merely general creditors, posterior in date to the said two mortgages of $2,000,000 and $4,000,000, and whose claims had been entirely cut off and extinguished by the foreclosure of said mortgages, and that one of such claims was paid by the said receiver to the said Marvin Sackett himself, and this defendant further avers that as he is informed and believes very little if any of the money received by the said Van Valkenburgh for the said certificates was actually expended upon or in any way to the advantage or benefit of the said railroad.

Fifteenth. This defendant further admits, that the said Trenor W. Park died intestate December 13th, 1882, and that this defendant was duly appointed ancillary administrator of the goods, chattels and credits of the said Trenor W. Park, by the surrogate of the county of New York, on the twelfth day of January, 1883.

Sixteenth. This defendant, upon his information and belief, further admits that the allegations contained in the twenty-fifth and twenty-sixth paragraphs of said complaint are substantially true as therein set forth, and he admits and avers that the said suit by said Sackett was brought and conducted, not with the intention of real-

izing the said property for the benefit of the bondholders, or any of them, or for himself as a bondholder, but with the intent that he and others should receive large sums of money from the said property, under the cover of payment of claims, which, if valid, were subordinate to said mortgages, and with the intent that said rail-
102 road and property should be acquired by others, free from the lien of said mortgages. And he particularly avers that neither the said Duncan nor the said Park, as the holder or holders of the said bond and mortgage for $5,000,000, which was a good, valid and subsisting lien upon the whole of said railroad, were parties to the said suit, and that the lien of the said mortgage was not in any way affected thereby, and that the said suit was brought and conducted by and between parties who had no real right or title to or interest in the said property, and that all the proceedings therein, including the issue of said certificates, and as well the final decree and sale thereunder, were wholly ineffectual, inoperative and void, not only as against the holders of said $5,000,000 mortgage, but for any purpose whatsoever, except as against the immediate parties thereto. This defendant has no knowledge or information sufficient to enable him to form a belief as to the truth of the allegations contained in the twenty-seventh, twenty-eighth and twenty-ninth paragraphs of the said complaint, and he therefore leaves the plaintiff to make such proof in respect thereto as he may be advised.

Eighteenth. This defendant denies each and every allegation in the said complaint contained, not hereinbefore specifically admitted or averred or denied.

Nineteenth. And this defendant further avers that such interest or rights as the plaintiff ever had in or to the property of the Lebanon Springs Railroad Company, or the Harlem Extension Railroad Company, if any, were wholly extinguished and terminated by the decrees of foreclosure of the mortgages made by the said companies respectively, as alleged in the said complaint, and that the said plaintiff has now no right, title or interest therein, or thereto, as against the said $5,000,000 mortgage, which is still outstand-
103 ing as a valid and subsisting lien thereon, or as against the parties holding the same or interested therein.

Wherefore this defendant prays that the said complaint may be dismissed with costs, and that this defendant may have such other and further judgment or relief in the premises as may be proper.

JENNINGS & RUSSELL,
Att'ys for Def't McCullough, as Adm'r, &c.

CITY AND COUNTY OF NEW YORK, *ss.:*

John G. McCullough, as ancil-ary administrator of the goods, chattels and credits which were of Trenor W. Park, deceased, being duly sworn, deposes and says: That he is the defendant named in the foregoing answer; that he has read the said answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN G. McCULLOUGH.

Sworn to — me, this 27th day of April, 1888.

GEO. E. GRANT,
Notary Public, N. Y. City and Co.

104 N. Y. Supreme Court, County of Rensselaer.

AARON R. STEVENS
against
THE UNION TRUST COMPANY OF NEW YORK, JESSE SELIGMAN, JOHN CROSBY BROWN, and Others.

Jesse Seligman and John Crosby Brown, two of the defendants in the above-entitled action, appearing therein by Bangs, Stetson, Tracy & MacVeagh, their attorneys, and not waiving but insisting on the objection that the second amended complaint in said action does not state facts sufficient to constitute a cause of action against them or either of them, answer the said second amended complaint as follows, that is to say:

First. They admit that the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation under and by virtue of the laws of the State of New York, by the filing of its articles of incorporation or association on the 25th day of March, 1852, and by the provisions of the various general and special acts, passed by the legislature of the State of New York, as alleged in the first paragraph of said complaint, but whether the said acts are correctly referred to in said paragraphs, these defendants have not nor has either of them any information sufficient to form a belief, and they leave the plaintiff to make such proof in respect thereof as he may be advised. These defendants further admit that by virtue of various laws of said State under which the said com-
105 pany was organized or created, and of which it was entitled to claim the benefit, and also by virtue of certain laws of the State of Vermont, the said company became vested with all powers and franchises of corporations and with certain special powers and franchises as stated in the first paragraph of said complaint, but whether the said legislative acts, of which the said company became entitled to claim the benefit, are correctly enumerated in said complaint, or whether the various powers and franchises which the said company received under and by virtue of said acts are fully stated in said complaint, these defendants have not nor has either of them knowledge sufficient to form a belief, and they leave the plaintiff to make such proof in respect thereof as he may be advised. These defendants further admit that the said company was duly organized, and its roads duly located and the construction thereof commenced; that on or about the 20th day of August, 1867, the Vermont and New York Railroad Company, by its deed of conveyance of that date, in all respects duly organized, acknowledged and recorded, and, in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebanon Springs Railroad Company, the said Vermont and New York railroad located as stated in said complaint, with all its privileges and ap-

purtenances and all the rights and franchises of said Vermont and New York Railroad Company, and that the said Lebanon Springs Railroad Company constructed the said railroad from Chatham to Bennington, as described in said complaint, including the completion of the Vermont and New York railroad, and completed the same and opened it to the public early in the year 1869, and operated the said railroad, as stated in the first paragraph of said complaint, and that said company also became possessed and the owner of the property, powers and franchises described in the first paragraph of said complaint; but they admit that none of the
106 above-mentioned rights, powers and franchises have lapsed, been lost, forfeited or expired, and that all the same are in full force, nevertheless these defendants say that it is not true, and they deny that the same are subject to the lien of the mortgage in the first paragraph of said complaint mentioned, or will pass in like full force or life to any purchaser or purchasers on a sale under such mortgage, or any new corporation organized thereunder, pursuant to the laws of New York.

Second. These defendants further admit the allegations contained in the second, third, fifth and sixth paragraphs of said complaint.

Third. These defendants have not nor had either of them knowledge or information sufficient to form a belief as to the truth of either or any of the allegations contained in the fourth and seventh paragraphs of said complaint, and therefore they deny the same.

Fourth. These defendants further admit the allegations contained in the eighth paragraph of said complaint, except however the allegation of the date when the Lebanon Springs Railroad Company therein mentioned first made default in the payment of the interest upon its bonds, as to which allegation and date they have not nor has either of them knowledge or information sufficient to form a belief.

Fifth. And these defendants further admit the allegations contained in the ninth, tenth and eleventh paragraphs of said complaint, except so far as the said allegations relate to an alleged foreclosure of the mortgage made by the Harlem Extension Railroad Company in a suit in the supreme court of the State of New York, and as to that they say, that as they are informed and believe it is not true, and they therefore deny that any action was commenced in said court as therein stated or otherwise to foreclose said mortgage, or that due notice
107 of the pendency of any such action was ever filed in the office of the clerk of the county of Rensselaer or in the office of the clerk of the county of Columbia, or that any defendant in any such action was ever duly or regularly or at all served with the process of said court, or subjected to the jurisdiction thereof, or duly or regularly appeared in such action prior to the first day of May, 1872, or in any other manner whatsoever. And they further deny that judgment was ever rendered or entered in that court in any such action to foreclose said mortgage of the Harlem Extension Railroad Company, or that the property or franchise therein described *were*

ever sold under any such foreclosure, and while they admit that the property and franchises described in the mortgage made by the Lebanon Springs Railroad Company were sold under the judgment mentioned in the eleventh paragraph of said complaint, on the 25th day of January, 1873, by Charles S. Fairchild, the referee duly appointed by said court in that behalf at Greenbush, in the county of Rensselaer, for the price of $100,000, they deny upon their information and belief that such property and franchise were so sold to the defendant William Butler Duncan, and on the contrary they aver that they were sold to the defendant James C. Hull, and they further admit and aver that the said referee thereupon executed and delivered to the defendant James C. Hull his deed of said road, property and franchises, bearing date January 25th, 1873, and that said deed was duly recorded in the clerks' offices of Rensselaer and Columbia counties, but whether said deed was so executed and delivered by direction of the defendant Duncan, or by the Union Trust Company of New York, as alleged in the said paragraph, these defendants have not nor has either of them knowledge or information sufficient to form a belief, and, therefore, they deny the same; and further answering the said paragraph, these defendants, while admitting that under and in pursuance of the decrees in the
108 court of chancery in the State of Vermont, mentioned in the eleventh paragraph of said complaint, the road, property, powers and franchises within the State of Vermont therein mentioned were by Daniel McEowen, a special master in chancery, appointed by the said court for that purpose on the 20th of January, 1873, sold; nevertheless they say that, as they are informed and believe, it is not true, and therefore they deny that they were so sold to Trenor W. Park, of Vermont, for the sum of $25,000 or for any other sum, and on the contrary they aver that they were so sold to Charles G. Lincoln for the sum of $50,000; and they further admit and aver that said special master thereupon executed and delivered to the said Lincoln deeds of said road, property and franchises, bearing date the said 20th of January, 1873, and that the said deeds were duly recorded in the office of the clerk of the county of Bennington, Vermont, on the 22d of January, 1873, but upon their information and belief, they deny that the said deeds were so executed or delivered by direction of the said Trenor W. Park, or by the said Union Trust Company of New York, and these defendants further deny the allegation that no part of either of said sums of $100,000 and $25,000 has been paid, and on the contrary they aver that the sum of $100,000, which was the consideration of said conveyance by the referee in the State of New York to the defendant Hull, was duly paid prior to such conveyance, and that the sum of $50,000, which was the consideration for the conveyances in the State of Vermont to said Lincoln, was duly paid by him prior to such conveyances. And these defendants further admit and aver that on the 28th day of January, 1873, the said Hull and Lincoln executed and delivered to the defendant Duncan and the said Trenor W. Park a bond conditioned for the payment of $5,000,000, on or before the 1st day of August, 1873, with

interest at 7 % per annum, and also that they and the defendant Melissa A. Hull executed and delivered to said Duncan and Park a mortgage to secure the payment of the
109 same, conveying all the roads, property, powers and franchises of the Harlem Extention Railroad Company, including those of the Lebanon Springs Railroad Company, and the Vermont and New York Railroad Company, in both States, as in said complaint set forth, and that the said mortgage was recorded in the offices of the clerks of Rensselaer and Columbia counties, on the 14th February, 1873, and in the clerk's office, in Bennington county, Vermont, on the 1st May, 1873, and these defendants further aver that the said decrees of foreclosure of the mortgages made by the Lebanon Springs and Harlem Extension Railroad Companies, and the conveyances thereunder to the said Hull and Lincoln, and the said bond and mortgage made by the said Hull and Lincoln are a complete and absolute bar to the pretended cause of action alleged by the plaintiff herein, and this defendant further admits that on the 30th of January, 1873, the defendants Hull and wife, and Lincoln, by separate deeds executed and delivered by them conveyed the said roads, property and franchises, situated in the State of New York, and in the State of Vermont respectively, to the New York, Boston and Montreal Railway Company, subject, however, to the said mortgage to Duncan and Park, and also to the said $500,000 prior mortgage on the old Bennington and Rutland railroad, as stated at folios 71 and 72 of said complaint, but they say that, as they are informed and believe, it is not true, and therefore they deny that such conveyances were without any consideration, or that such acts of the said Hull, Lincoln, Duncan or Park were done for the sole or any use or benefit or in behalf of or as agents or trustees for the holders of the bonds issued by the Lebanon Springs Railroad Company, or the Harlem Extension Railroad Company as aforesaid, by virtue of agreements validly made by them so to act or in any other manner whatsoever, and they further deny the allegation contained at the end of the eleventh paragraph of said complaint that said mortgage for $5 000,000
110 had no other consideration than as is therein alleged.

Sixth. These defendants have not nor has either of them knowledge or information sufficient to enable them to form a belief as to the truth or correctness of the allegations contained in the twelfth paragraph of said complaint as to the construction, purposes and effect of the said $5,000,000 mortgage, or of the consolidation agreement, by which the New York, Boston and Montreal Railway Company was formed, or of the other agreements and arrangements by which the property of the said Harlem Extension Railroad Company was to be acquired by the said New York, Boston and Montreal Railway Company, or of the agreement made on or about February 11th, 1873, between the said New York, Boston and Montreal Railway Company, and the said Duncan and Park, and therefore they refer to the said agreements, mortgage and written instruments for the contents and the true intent and meaning thereof, and they deny each and every allegation in said twelfth paragraph

of the complaint contained which is in anywise inconsistent with the written mortgage and agreements themselves. But they admit, as they are informed and believe to be true, the moneys to be paid by the New York, Boston and Montreal Railway Company to secure the payment and discharge of the aforesaid $5,000,000 mortgage were to be so paid to the defendant Duncan alone, who was to have the custody of said moneys and to disburse the same, and they further admit that the said bond and mortgage together with the satisfaction thereof in writing was placed in the custody of these defendants Jesse Seligman and John Crosby Brown, as trustees in the said agreement mentioned, who in accordance with the provisions of the said agreements and arrangements, and as authorized by power of attorney, were to receive and endorse upon said bonds the payments that should be made thereon, and upon full pay-
111 ment thereof within the time stipulated to file the said satisfaction piece and thus discharge such mortgage of record, but in case of failure by said company to pay the full amount due on or before August, 1873, to return the bond and mortgage and satisfaction piece to the mortgagees; and they further admit that as they are informed and believe to be true it was in and by the said agreements further provided that if the said company should for the reasons therein mentioned fail to pay the amount due upon said bond and mortgage on or before August 1st, 1873, that under certain conditions the payment of such sums was to be extended for the further period of eighteen months from the said 1st day of August, 1873, but they deny that the said condition was ever fulfilled or that the payment of such sum was extended.

Seventh. And these defendants further admit and allege that the said New York, Boston and Montreal Company, through these defendants as disbursement trustees, paid to the defendant the sum of about $807,077.05, as stated in the thirteenth paragraph of said complaint, on account of the moneys due on said bond and mortgage, and that said mortgage long since and on or about February 1st, 1875, became wholly due and payable, and that the said company wholly failed to pay on or before said last-mentioned day or at any other time the remainder, being much the larger part of the sum due upon said bond and mortgage, and has never paid the same nor any part thereof, and has never completed its railroad and has become insolvent and has abandoned its undertaking and is wholly unable to pay and discharge such bond and mortgage debt or any part thereof, and that a receiver of its property and effects has been appointed, as stated in the said thirteenth paragraph of said complaint, and that he has never taken any action whatever toward completing said railroad, or carrying on its enterprise
112 or fulfilling its obligation, but has wholly failed so to do.

Eighth. These defendants, answering the allegation contained in the fourteenth paragraph of the complaint, admit that during the year 1873, the said The New York, Boston and Montreal Railroad Company executed and delivered to the defendants Jesse Seligman, William Watts Sherman and John Crosby Brown, as trustees as mentioned in the said mortgage, a certain mortgage to

secure bonds amounting in the aggregate to $12,250,000, which mortgage was recorded on the 15th day of March, 1873, in the office of the clerk of Rensselaer county, in Book 138 of Mortgages, at p. 1, and that afterwards and on the 1st day of April, 1873, the said The New York, Boston and Montreal Railway Company executed and delivered a certain other mortgage to secure their bonds in the aggregate amount of $12,750,000, which mortgage was recorded in the said office of the clerk of Rensselaer county, on the 26th day of June, 1873, in Book 140 of Mortgages, at p. 21, and that bonds under both of said last-mentioned mortgages were issued, and many of both were sold and are still outstanding, and except as above admitted, these defendants have not nor has either of them knowledge or information sufficient to form a belief as to the truth of any allegation contained in the said fourteenth paragraph of said complaint, although they believe the allegations to be true substantially as therein set forth, and they leave the plaintiff to make such proof in respect thereof as he may be advised.

Ninth. These defendants say that as they are advised and believe it is not true as stated in the fifteenth paragraph of the complaint, and therefore they deny the allegation in said paragraph contained, that by reason of the insolvency of the New York, Boston and Montreal Railway Company, or of its failure or inability to
113 complete and operate its railroad, or to pay the amount due upon said $5,000,000 mortgage, the said company has no title to the said Lebanon Springs Railroad Company, its franchises or property, as against the holders of the bonds issued as stated in said complaint under said mortgages for $2,000,000 and for $4,000,000, or that as against the said New York, Boston and Montreal Railway Company, or the receiver of said company or otherwise, the said bondholders are entitled to hold or possess said railroad, its property or franchises, or to have the same sold for their benefit, or that the plaintiff or the other bondholders are now entitled to the benefit or advantage of the said $5,000,000 mortgage, or that the said Duncan holds the same for them, or that they are entitled to have the same enforced for their benefit.

Tenth. These defendants admit the allegations contained in the sixteenth paragraph of said complaint, except that as they are advised and believe it is not true, and therefore they deny that the plaintiff or other like bondholders are entitled to have the sale therein mentioned proceeded with for their benefit or on their behalf.

Eleventh. And these defendants say that, as they are informed and believe, it is not true, as stated in the seventeenth paragraph of the complaint, and therefore they deny the allegation in such paragraph contained, that the defendant Duncan, and the defendant McCullough have or had no title or interest in said mortgage executed by the said Hull and Lincoln for $5,000,000, save their interest as holders of the bonds of the Lebanon Springs Railroad Company.

Twelfth. And these defendants, further answering the said complaint and the allegations contained in the paragraphs numbered

18th, 19th, 20th, 21st, 22d, 23d, 25th, 26th, 27th, 28th, and
114 29th, deny knowledge or information sufficient to form a belief as to the truth of any or either of such allegations.

Thirteenth. These defendants admit the allegation contained in the paragraph of the complaint numbered twenty-four, as to the death of the said Trenor W. Park, and the allegation contained in the paragraph of the complaint numbered thirty, that these defendants claim some right or interest in the said railroad and property, which interest is that held by them as trustees under the disbursement agreement hereinbefore mentioned in possession of the said bond and mortgage for $5,000,000, which right and interest on their part is not, as they are informed and believe, subordinate to the mortgages of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and in respect to the claims made by the other defendants herein, these defendants have no knowledge or information sufficient to enable them to form a belief, and they leave the plaintiff to make such proof in respect thereto as he may be advised.

Fourteenth. These defendants have not nor has either of them knowledge or information sufficient to form a belief as to any allegation in the said complaint contained not hereinbefore specifically admitted or denied.

Fifteenth. And these defendants further aver that, as they are informed and believe, such interest or rights as the plaintiff ever had in or to the property of the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company, if any, were wholly extinguished and terminated by the decrees of foreclosure of the mortgages made by the said companies respectively, as alleged in the said complaint, and that the said plaintiff has now no right, title or interest therein or thereto, as against the said $5,000,000
mortgage, which is still outstanding as a valid and subsist-
115 ing lien thereon, or as against the parties holding the same or interested therein.

Wherefore these defendants pray that the said complaint may be dismissed with costs, and that these defendants may have such other and further judgment or relief as may be proper.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendants Brown and Seligman,
45 *William Street, N. Y.*

CITY AND COUNTY OF NEW YORK, *ss:*

John Crosby Brown and Jesse Seligman, being duly sworn, each for himself and not for the other, deposes and says, as follows: I am one of the defendants named in the foregoing answer, and I know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to these matters I believe it to be true.

JESSE SELIGMAN.
JOHN CROSBY BROWN.

Sworn to before me this 11th day of May, 1888.
HOWARD VAN SINDEREN,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

116 Supreme Court.

AARON R. STEVENS
against
THE UNION TRUST COMPANY OF NEW YORK and Others.

The separate answer of Daniel Butterfield, as receiver of the property of the New York, Boston and Montreal Railway Company, alleges as follows:

First. He admits that he was appointed by the supreme court of the State of New York receiver of all the property of said railway company on or about the 15th day of April, 1875, and that he has never taken any action whatever towards completing the road referred to in the 13th paragraph of the complaint or carrying on its enterprise or fulfilling its obligations.

Second. He has no knowledge or information sufficient to form a belief as to the other allegations of the complaint.

GOODRICH, DEADY & GOODRICH,
Att'ys for Butterfield, 59 Wall Street, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Daniel Butterfield, being duly sworn, says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

DAN'L BUTTERFIELD.

Sworn to before me this 3d day of May, 1888.
FRED'K GIBLIN,
Notary Public, Kings Co.

Certificate filed in New York county.

117 Supreme Court, County of Rensselaer.

AARON R. STEVENS, Plaintiff,
against
THE UNION TRUST COMPANY OF NEW YORK, JAMES C. HULL, Melissa A. Hull, His Wife; Charles G. Lincoln, William Butler Duncan, and Others, Defendants.

The answer of the defendant William Butler Duncan to the second amended complaint of the plaintiff in this action.

First. The said defendant admits that the Lebanon Springs Rail road Company became and was created a duly organized and exist

ing corporation under and by virtue of the laws of the State of New York by filing its articles of incorporation or association on the 25th day of March, 1852, by the provisions of various general and special acts of the legislature of the State of New York, as alleged in the first paragraph of said complaint, but whether the said several acts are correctly set forth in the said complaint this defendant has no knowledge or information sufficient to form a belief, and leaves the plaintiff to make such proof thereof as he may be advised.

And this defendant further admits that by virtue of various acts of the legislature of said State, under which the said company was organized or created and of which it was entitled to claim
118 the benefit, and also by virtue of certain acts passed by the legislature of the State of Vermont, the said company became vested with all the powers and franchises of ordinary railroad corporations in said States respectively, and with certain special powers and franchises as stated in the first paragraph of the said complaint, but whether the said acts of which the said company became entitled to claim the benefit are correctly enumerated and described in said complaint, or whether the various powers and franchises which the said company received under and by virtue of such acts are fully stated in said complaint, this defendant has no knowledge or information sufficient to form a belief, and he leaves the plaintiff to make such proof in respect thereto as he may be advised.

Said defendant further admits that said company was duly organized and its roads duly located and the construction thereof commenced; that on or about the 20th August, 1867, the Vermont and New York R. R. Co., by its deed of conveyance of that date, in all respects duly authorized, acknowledged, and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebanon Springs R. R. Company the said Vermont and New York railroad located as stated in said complaint, with all its privileges and appurtenances and all the rights and franchises of said Vermont and New York Railroad Company, and that the said Lebanon Springs Railroad Company constructed the said railroad from Chatham to Bennington as described in said complaint, including the completion of the Vermont and New York railroad, and completed the same and opened it to the public early in the year 1869, and operated the said railroad as stated in the first paragraph of said complaint, and that said company also became possessed and the owner of the property, powers, and franchises described in the first paragraph of said complaint, but this defendant, while he admits that none of the above-mentioned rights,
119 powers, and franchises have lapsed, been lost, forfeited, or expired, and that all the same are in full force, says that it is not true and he denies that the same are subject to the lien of the mortgage in the first paragraph of said complaint mentioned, or will pass in like full force or life to any purchaser or purchasers on a sale under such mortgage or to any new corporation organized thereunder pursuant to the laws of New York.

Second. The said defendant, further answering, admits the alle-

gations contained in the second, third, fifth and sixth paragraphs of the said complaint.

Third. The said defendant, further answering, says that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth and seventh paragraphs of the said complaint or any or either of said allegations, and leaves the plaintiff to make such proof thereof as he may be advised.

Fourth. The said defendant, further answering, admits the allegations contained in the eighth paragraph of the said complaint, except the allegation as to the date when default was first made in the payment of interest, and as to that allegation the said defendant says that he has no knowledge or information sufficient to form a belief.

Fifth. And this defendant, further answering, admits the allegations contained in the ninth, tenth and eleventh paragraphs of the said complaint, except so far as the said allegations relate to an alleged foreclosure of the mortgage made by the Harlem Extension Railroad Company in a suit in the supreme court of the State of New York, and as to that he says that, as he is informed and believes, it is not true and he therefore denies that any action
120 was commenced in said court, as therein stated or otherwise, to foreclose said mortgage, or that due notice of the pendency of any such action was ever filed in the offices of the clerks of the counties of Rensselaer and Columbia or either of them, or that any defendants in any such action were ever duly or regularly or at all served with process of said court or subjected to the jurisdiction thereof, or duly or regularly appeared in such action prior to the 1st day of May, 1872, or otherwise howsoever; and he further denies that judgment was ever rendered or entered in that court in any action to foreclose said mortgage of the Harlem Extension Railroad Company, or that the property or franchises therein described were ever sold under any such foreclosure, and while he admits that the property and franchises described in the mortgage made by the Lebanon Springs Railroad Company were sold under the judgment in the eleventh paragraph of the said complaint referred to on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by said court in that behalf at Greenbush, in the county of Rensselaer, for the price of $100,000, he denies that such property and franchises were so sold to this defendant, and on the contrary avers that they were so sold to the defendant James C. Hull. And he further admits and avers that the said referee thereupon executed and delivered to the defendant James C. Hull his deed of the said road, property and franchises, bearing date the 25th of January, 1873, and that said deed was duly recorded in the clerks' offices of Rensselaer and Columbia counties, and he denies that the said deed was so delivered by direction of this defendant or of the Union Trust Company of New York, as alleged in said paragraph, and avers that the said deed was so delivered in pursuance of the directions contained in the said judgment to the said Hull, he having become the purchaser of the said property sold under said decree,

and except further that while this defendant admits that under
121 and in pursuance of the decrees in the court of chancery, in the State of Vermont, in the eleventh paragraph of the said complaint referred to, the road, property, powers and franchises within the State of Vermont therein mentioned were, by Daniel McEowen, a special master in chancery, appointed by the said court for that purpose on the 20th January, 1873, sold; he denies, upon information and belief, that they were so sold to Trenor W. Park, of Vermont, for the sum of $25,000 or any other sum, and he, on information and belief, alleges that they were so sold to Charles G. Lincoln.

And he further, upon information and belief, denies that the deeds executed and delivered by the said special master to the said Lincoln were so executed or delivered by direction of the said Trenor W. Park or of the said Union Trust Company of New York, but alleges on information and belief that they were so delivered under the orders or decrees of the said court of chancery; and this defendant, upon information and belief, denies that no part of either of said sums of $100,000 and $25,000 has ever been paid as alleged in folio 69 of said complaint, and on the contrary, on information and belief, alleges that the considerations expressed in the said conveyances by the said referee to the said defendant Hull, and in the conveyances executed and delivered by the said special master to the said Lincoln for the property in Vermont were both duly paid prior to such conveyances, and except further that this defendant denies that the said conveyances made by the defendants Hull and wife and the defendant Lincoln to the New York, Boston and Montreal Railway Company, subject to the said five-million-dollar mortgage to this defendant and the said Trenor W. Park, and to the said $500,000 prior mortgage on the old Bennington and Rutland railroad, were without any consideration, or that such acts of the said Hull, Lincoln, Duncan or Park were done for the sole or any use or benefit or in behalf of or as agents or trustees for the holders of the bonds issued by the Lebanon Springs Railroad
122 Company or the Harlem Extension Railroad Company, as aforesaid, by virtue of agreements validly made by them to so act or otherwise, howsoever, or that the said mortgage for $5,000,000 had no other consideration as alleged at the end of the eleventh paragraph of said complaint.

And this defendant further answering alleges that the said judgment and decrees foreclosing the said mortgages by the said Lebanon Springs and Harlem Extension Railroad Companies so rendered in and by the said courts of New York and Vermont respectively, and the sales and conveyances made under the said judgments and decrees respectively to the said Hull and Lincoln, and the said bond and mortgage made, executed and delivered by the said Hull and Lincoln to the said Park, and this defendant, in the said complaint mentioned, constitute a complete and absolute bar to the pretended cause of action alleged by the plaintiff herein.

Sixth. The said defendant further answering as to the allegations contained in the twelfth paragraph of the said complaint, says:

That it is untrue that the said $5,000,000 mortgage made by this defendant and the said Park, represented substantially the aggregate indebtedness, being the aforesaid bonds of the Lebanon Springs Railroad Company, and the Harlem Extension Railroad Company, mentioned in said complaint, which the defendant The New York, Boston and Montreal Railway Company was to assume and pay according to the terms of the consolidation agreement by which it was formed, and of the other agreements and arrangements mentioned in the said complaint under which the property of said Harlem Extension Railroad Company was to be acquired by the said New York, Boston and Montreal Railway Company, as alleged in said complaint, or was made in order to secure and maintain a lien upon the said premises for the payment of such indebtedness in any other sense than that in getting at what would be a fair price
123 for the said New York, Boston and Montreal Railway Company to pay in its bonds for the said railroad and property of the said Harlem Extension Railroad Company; at the time of the agreement for consolidation the mortgage and unsecured indebtedness of said Harlem Extension Railroad Company was taken into account in fixing the price so to be paid for the said railroad property, but this defendant says that the said $5,000,000 mortgage was made in order to create and maintain a lien upon the said premises in favor of the said Park and Duncan so as to secure to them the price which the said New York, Boston and Montreal Railway Company had agreed to pay for the said property, and that the said railroad property having been sold under the judgments and decrees of foreclosure hereinbefore mentioned and the lien of the said mortgages of the said Lebanon Springs and the said Harlem Extension Railroad Companies, and the title of the said New York, Boston and Montreal Railway Company having been extinguished by the sales under said judgments and decrees of foreclosure, a new agreement was made and entered into on or about the 11th day of February, 1873, between the defendant The New York, Boston and Montreal Railway Company and the said Park and this defendant, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company to the said Park and this defendant, as mortgagees, and that in and by said agreement it was further provided that the said $5,000,000 mortgage with the bond secured thereby were to be delivered upon the signing of the said agreement to the said Jesse Seligman and John Crosby Brown named in said agreement, and also a satisfaction piece of the said mortgage so belonging to them, in trust to hold the same and receive for account of the mortgagees the payments thereunder under the terms of the said agreement, and endorse the same thereon, to pay over the moneys and securities received for account of the said mortgagees to the said mortgagees, and
124 upon the receipt by the trustees, Seligman and Brown, of the whole amount of cash and bonds to be paid to the said mortgagees under the terms of the said agreement by a date therein fixed, to cancel and surrender the said bond to the company and satisfy the said mortgage of record, and in case of default in paying

the full amount agreed to be paid for said mortgage within the times in that behalf specified in said agreement the said bond and mortgage with the said satisfaction piece were to be redelivered to the mortgagees as by the said agreement, reference being thereto had, will more fully appear. And this defendant denies each and every allegation in the said twelfth paragraph of the complaint contained except so far as herein expressly admitted.

Seventh. This defendant further answering admits the allegations of the thirteenth paragraph of the said complaint.

Eighth. The said defendant, further answering on information and belief, admits the allegations of the fourteenth paragraph of said complaint touching the execution, delivery and recording of the said two mortgages by the New York, Boston and Montreal Railway Company and the issue and sale of bonds thereunder by the said company, and that many of said bonds are still outstanding. As to the allegations contained in said fourteenth paragraph not hereinbefore expressly admitted this defendant has no knowledge or information sufficient to form a belief as to the truth of said allegations or any or either of them.

Ninth. The said defendant, further answering upon information and belief, denies each and every of the allegations contained in the fifteenth paragraph of the said complaint.

Tenth. The said defendant, further answering on informa-
125 tion and belief, admits the allegations contained in the sixteenth paragraph of the said complaint, except the allegation therein that the plaintiff and other like bondholders are entitled to have the said sale proceeded with for their benefit and on their behalf, which allegation the said defendant, on information and belief, denies.

Eleventh. The said defendant, further answering on information and belief, denies the allegations of the said complaint contained in the seventeenth paragraph thereof, and each and every of said allegations.

Twelfth. The said defendant, further answering on information and belief, admits the truth of the allegations contained in the eighteenth and nineteenth paragraphs of the said complaint.

Thirteenth. This defendant, upon information and belief, admits that in or about the year 1880, an action was brought in this court by one Marvin Sackett, who claimed to be the owner of eight thousand five hundred dollars of the bonds so issued by the Lebanon Springs Railroad Company against the persons in that behalf mentioned in the twentieth paragraph of the said complaint, but this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations touching the various proceedings had in the said suit, and other matters alleged in the said twentieth paragraph of the said complaint and in the twenty-first, twenty-second and twenty-third paragraphs thereof, or any or either of the said allegations, and he therefore leaves the plaintiff to make such proof thereof as he may be advised.

Fourteenth. The said defendant on information and belief, ad-

mits the allegations of the twenty-fourth paragraph of the said complaint.

Fifteenth. The said defendant, further answering, says that
126 he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth paragraphs of the said complaint, or any or either of the said allegations, and he therefore leaves the plaintiff to make such proof thereof as — may be advised.

Sixteenth. In answer to the allegations of the said complaint contained in the thirtieth paragraph of the said complaint, this defendant says that so far as this defendant and the defendant McCullough, as administrator of the goods, chattels and credits of the said Trenor W. Park, are concerned, it is not true and he therefore denies that their rights and interests in the said railroad and property are subordinate to the mortgages of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and as to the claims made by the other defendants, this defendant has no knowledge or information sufficient to form a belief, and he therefore leaves the plaintiff to make such proof thereof as he may be advised.

Seventeenth. The said defendant further answering denies each and every allegation in the said complaint contained not hereinbefore specifically admitted, averred or denied.

Eighteenth. The said defendant further answering avers that such interests or rights as the plaintiff ever had in or to the property of the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company, if any, were wholly extinguished and terminated by the judgments and decrees of foreclosure of the mortgages made by the said companies respectively as alleged in the said complaint, and the sales had under said judgments and decrees and conveyances made thereupon, and that the said plaintiff has now no right, title or interest thereto or therein against
127 the said $5,000,000 mortgage which is still outstanding as a valid and subsisting lien thereon, or as against the parties holding the same or interested therein.

Nineteenth. And for a further and separate defense, the said defendant relying upon the allegations, admissions and denials hereinbefore contained in the same manner as if the same were here repeated, further answering, says that by an indenture bearing date the 27th day of July, 1875, duly made, executed and delivered by and between this defendant and his copartners under the firm of Duncan, Sherman & Company of the first part and one William D. Shipman of the second part, the parties of the first part granted, conveyed, sold, assigned, transferred and set over unto the said William D. Shipman all and singular the lands, tenements, hereditaments, goods, chattels and choses in action belonging to them as copartners and also all and singular the lands, tenements, hereditaments, goods, chattels and choses in action belonging to them severally and individually upon certain trusts for the benefit of creditors, which said indenture was duly recorded in the office of the

register of the city and county of New York on the 28th day of July, 1875, in Liber 1331 of Conveyances at page 379. That the said William D. Shipman duly accepted the said assignment and gave the security required by law and entered upon and still continues in the discharge of the trusts thereby created, and that as this defendant is advised and believes the interest which he had in the said five-million-dollar mortgage executed by the said defendants Hull and wife and the said Charles G. Lincoln in favor of the said Trenor W. Park and this defendant, and in the said railroad and property thereby mortgaged, passed to and became and now is vested in the said William D. Shipman as assignee under the said assignment, and that there is a defect of parties to this action
128 in this, that the said William D. Shipman, who is still living, to wit, at Long Island City, in the county of Queens and State of New York, is not made a party hereto, and that without the presence of the said William D. Shipman as assignee as aforesaid as a party to this action no full or complete determination of the rights of the several parties in and to the railroad and other property in the complaint described can be had.

The said defendant therefore prays judgment in this action dismissing the complaint, with costs.

SOLOMON HANFORD,
Attorney for Defendant William B. Duncan,
35 *William Street, New York City.*

CITY AND COUNTY OF NEW YORK, *ss:*

William Butler Duncan, the defendant above named, being duly sworn, says: That the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes the same to be true.

W. BUTLER DUNCAN.

Sworn before me this 25th day of May, 1888.

FRANCIS E. PARKER,
Notary Public, N. Y. City and County.

129 Supreme Court.

AARON R. STEVENS
against
THE UNION TRUST COMPANY and Others.

Stipulated that the summons and complaint in the above-entitled action be deemed amended in conformity with an order granted herein by Mr. Justice Mayham on the 24th day of July, 1888, and

that the answers already served stand as answers to the complaint so amended.

Dated August 7th, 1888.

CAMPBELL & PAIGE, *Att'ys for Pl'ff.*
DELOS McCURDY,
Att'y for Def't Am. L. & T. Co.
VANDERPOEL, GREEN & CUMING,
Att'ys for Def't N. Y. & — R. R. Co.
JOHN YARD, *Att'y for Wm. Foster, Jr.*
CRANE, LOCKWOOD & FOWLER,
Att'ys for Royal E. Robins et al.
GOODRICH, DEADY & GOODRICH,
Att'ys for Butterfield, R'c'r, & N. Y. B., & M. R. R.
BANGS, STETSON, TRACY & MacVEAGH,
Att'ys for Brown et al.
JENNINGS & RUSSELL,
Att'ys for Def't McCullough as Adm'r, &c.
HALE, COWEN & BULKLEY,
Att ys for Central Nat. Bank of Boston.

130 Supreme Court, County of Rensselaer.

AARON R. STEVENS, Plaintiff,
against
THE UNION TRUST COMPANY OF — YORK, JAMES C. HULL, Melissa A. Hull, His Wife; Charles G. Lincoln, William Butler Duncan, and Others, Defendants.

The answer of the defendant William D. Shipman, as assignee of William Butler Duncan, to the third amended complaint of the plaintiff in this action.

First. The said defendant, upon information and belief, admits that the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation under and by virtue of the laws of the State of New York, by filing its articles of incorporation or association on the 25th day of March, 1852, by the provisions of various general and special acts of the legislature of the State of New York, as alleged in the first paragraph of said complaint, but whether the said several acts are correctly set forth in said complaint this defendant has no knowledge or information sufficient to form a belief, and leaves the plaintiff to make such proof thereof as he may be advised.

And this defendant further, upon information and belief, admits that by virtue of various acts of the legislature of said State,
131 under which the said company was organized or created and of which it was entitled to claim the benefit, and also by virtue of certain acts passed by the legislature of the State of Vermont, the said company became vested with all the powers and franchises of ordinary railroad corporations in said States respectively, and with certain special powers and franchises as stated

in the first paragraph of the said complaint, but whether the said acts of which the said company became entitled to claim the benefit are correctly enumerated and described in said complaint, or whether the various powers and franchises, which the said company received under and by virtue of such acts are fully stated in said complaint, this defendant has no knowledge or information sufficient to form a belief, and he leaves the plaintiff to make such proof in respect thereto as he may be advised.

Said defendant, upon information and belief, further admits that said company was duly organized and its road duly located and the construction thereof commenced; that on or about the 20th of August, 1867, the Vermont and New York R. R. Co., by its deed of conveyance of that date, in all respects duly authorized, acknowledged and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebanon Springs R. R. Company the said Vermont and New York railroad, located as stated in said complaint, with all its privileges and appurtenances and all the rights and franchises of said Vermont and New York Railroad Company, and that the said Lebanon Springs Railroad Company constructed the said railroad from Chatham to Bennington as described in said complaint, including the completion of the Vermont and New York railroad, and completed the same and opened it to the public early in the year 1869, and operated the said railroad as stated in the first paragraph of said complaint, and that said company also became possessed and the owner of the property, powers and franchises described in the first paragraph of said complaint, but this defendant, while he admits that none
132 of the above-mentioned rights, powers and franchises have lapsed, been lost, forfeited or expired, and that all the same are in full force, says upon information and belief that it is not true and he therefore denies that the same are subject to the lien of the mortgage in the first paragraph of said complaint mentioned, or will pass in like full force or life to any purchaser or purchasers on a sale under such mortgage, or to any new corporation organized thereunder pursuant to the laws of New York.

Second. The said defendant, further answering upon information and belief, admits the allegations contained in the second, third, fifth and sixth paragraphs of the said complaint.

Third. The said defendant, further answering, says that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth and seventh paragraphs of the said complaint or any or either of said allegations, and leaves the plaintiff to make such proof thereof as he may be advised.

Fourth. The said defendant, further answering upon information and belief, admits the allegations contained in the eighth paragraph of the said complaint, except the allegation as to the date when default was first made in the payment of interest, and as to that allegation the said defendant says that he has no knowledge or information sufficient to form a belief.

Fifth. And this defendant, further answering on information and

belief, admits the allegations contained in the ninth, tenth and eleventh paragraphs of the said complaint, except so far as the said allegations relate to an alleged foreclosure of the mortgage made by the Harlem Extension Railroad Company in a suit in the
133 supreme court of the State of New York, and as to that he says that as he is informed and believes it is not true, and he therefore denies that any action was commenced in said court, as therein stated or otherwise, to foreclose said mortgage, or that due notice of the pendency of any such action was ever filed in the offices of the clerks of the counties of Rensselaer and Columbia, or either of them, or that any defendants in any such action were ever duly or regularly or at all served with process of said court or subjected to the jurisdiction thereof, or duly or regularly appeared in such action prior to the 1st day of May, 1872, or otherwise howsoever, and he further denies, upon information and belief, that judgment was ever rendered or entered in that court in any such action to foreclose said mortgage of the Harlem Extension Railroad Company, or that the property or franchises therein described were ever sold under any such foreclosure, and while he admits that the property and franchises described in the mortgage made by the Lebanon Springs Railroad Company were sold under the judgment in the eleventh paragraph of the said complaint referred to on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by said court, in that behalf at Greenbush, in the county of Rensselaer, for the price of $100,000, he denies upon information and belief that such property and franchises were so sold to the defendant Duncan, and on the contrary, on information and belief, avers that they were so sold to the defendant James C. Hull. And he further admits and avers, upon information and belief, that the said referee thereupon executed and delivered to the defendant James C. Hull his deed of the said road, property and franchises, bearing date the 25th of January, 1873, and that said deed was duly recorded in the clerks' office of Rensselaer and Columbia counties, and he denies, upon information and belief, that the said deed was so delivered by direction of the defendant Duncan or of the
134 Union Trust Company of New York, as alleged in said paragraph, and, upon information and belief, avers that the said deed was so delivered in pursuance of the directions contained in the said judgment to the said Hull, he having become the purchaser of the said property sold under said decree, and except further that while this defendant, upon information and belief, admits that under and in pursuance of the decrees in the court of chancery in the State of Vermont, in the eleventh paragraph of the said complaint referred to, the road, property, powers and franchises within the State of Vermont, therein mentioned, were by Daniel McEowen, a special master in chancery, appointed by the said court for that purpose on the 20th January, 1873, sold, he denies, upon information and belief, that they were so sold to Trenor W. Park, of Vermont, for the sum of $25,000, or any other sum, and he, on information and belief, alleges that they were so sold to Charles G. Lincoln.

And he further, upon information and belief, denies that the deeds executed and delivered by the said special master to the said Lincoln were so executed or delivered by direction of the said Trenor W. Park or of the said Union Trust Company of New York, but alleges on information and belief that they were so delivered under the orders or decrees of the said court of chancery; and this defendant, upon information and belief, denies that no part of either of said sums of $100,000 and $25,000 has ever been paid as alleged in folio 69 of said complaint, and on the contrary, on information and belief, alleges that the considerations expressed in the said conveyances by the said referee to the said defendant Hull and in the conveyances executed and delivered by the said special master to the said Lincoln for the property in Vermont, were both duly paid prior to such conveyances, and except further that this defendant, upon information and belief, denies that the said conveyances made by the defendants Hull and wife and the defendant Lincoln, to the New York, Boston and Montreal Railway Company,
135 subject to the said five-million-dollar mortgage to the defendant Duncan, and the said Trenor W. Park, and to the said $500,000 prior mortgage on the old Bennington and Rutland railroad, were without any consideration, or that such acts of the said Hull, Lincoln, Duncan or Park were done for the sole or any use or benefit, or in behalf of, or as agents or trustees for the holders of the bonds issued by the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company, as aforesaid, by virtue of agreements validly made by them to so act or otherwise howsoever, or that the said mortgage for $5,000,000 had no other consideration, as alleged at the end of the eleventh paragraph of said complaint.

And this defendant further answering on information and belief alleges that the said judgment and decrees forclosing the said mortgages by the said Lebanon Springs and Harlem Extension Railroad Companies so rendered in and by the said courts of New York and Vermont respectively and the sales and conveyances made under the said judgments and decrees respectively to the said Hull and Lincoln and the said bond and mortgage made, executed and delivered by the said Hull and Lincoln to the said Park and the defendant Duncan, in the said complaint mentioned, constitute a complete and absolute bar to the pretended cause of action alleged by the plaintiff herein.

Sixth. The said defendant, further answering upon information and belief as to the allegations contained in the twelfth paragraph of the said complaint, says that it is untrue that the said $5,000,000 mortgage made to this defendant and the said Park represented substantially the aggregate indebtedness, being the aforesaid bonds of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company mentioned in said complaint which the defendant The New York, Boston and Montreal Railway
136 Company was to assume and pay according to the terms of the consolidation agreement by which it was formed and of the other agreements and arrangements mentioned in the said com-

plaint under which the property of said Harlem Extension Railroad Company was to be acquired by the said New York, Boston and Montreal Railway Company, as alleged in said complaint, or was made in order to secure and maintain a lien upon the said premises for the payment of such indebtedness in any other sense than that in getting at what would be a fair price for the said New York, Boston and Montreal Railway Company to pay in its bonds for the said railroad and property of the said Harlem Extension Railroad Company at the time of the agreement for consolidation the mortgage and unsecured indebtedness of said Harlem Extension Railroad Company was taken into account in fixing the price so to be paid for the said railroad property, but this defendant upon information and belief says that the said $5,000,000 mortgage was made in order to create and maintain a lien upon the said premises in favor of the said Park and Duncan so as to secure to them the price which the said New York, Boston and Montreal Railway Company had agreed to pay for the said property, and that the said railroad property, having been sold under the judgments and decrees of foreclosure hereinbefore mentioned and the lien of the said mortgages of the said Lebanon Springs and the said Harlem Extension Railroad Companies, and the title of the said New York, Boston and Montreal Railway Company having been extinguished by the sales under said judgments and decrees of foreclosure, a new agreement was made and entered into on or about the 11th day of February, 1873, between the defendant The New York, Boston and Montreal Railway Company and the said Park and the defendant Duncan, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company to the said Park and the defendant Duncan, as mortgagees, and

137 that in and by said agreement it was further provided that in the said $5,000,000 mortgage with the bond secured thereby were to be delivered upon the signing of the said agreement to the said Jesse Seligman and John Crosby Brown, named in said agreement, and also a satisfaction piece of the said mortgage so belonging to them, in trust to hold the same and receive for account of the mortgagees the payments thereunder under the terms of the said agreement, and endorse the same thereon, to pay over the moneys and securities received for account of the said mortgagees to the said mortgagees, and upon the receipt by the trustees, Seligman and Brown, of the whole amount of cash and bonds to be paid to the said mortgagees under the terms of the said agreement by a date therein fixed, to cancel and surrender the said bond to the company and satisfy the said mortgage of record, and in case of default in paying the full amount agreed to be paid for said mortgage within the times in that behalf specified in the said agreement, the said bond and mortgage with the said satisfaction piece were to be redelivered to the mortgagees as by the said agreement, reference being thereto had will more fully appear. And this defendant upon information and belief denies each and every allegation in the said twelfth paragraph of the complaint contained except so far as herein expressly admitted.

Seventh. This defendant, further answering upon information and belief, admits the allegations of the thirteenth paragraph of the said complaint.

Eighth. The said defendant, further answering on information and belief, admits the allegations of the fourteenth paragraph of said complaint touching the execution, delivery and recording of the said two mortgages by the New York, Boston and Montreal Railway Company and the issue and sale of bonds thereunder by the said company, and that many of said bonds are still outstanding. As to the allegations contained in the said fourteenth
138 paragraph not hereinabove expressly admitted, this defendant has no knowledge or information sufficient to form a belief as to the truth of said allegations or any or either of them.

Ninth. The said defendant, further answering upon information and belief, denies each and every of the allegations contained in the fifteenth paragraph of the said complaint.

Tenth. The said defendant, further answering on information and belief, admits the allegations contained in the sixteenth paragraph of the said complaint, except the allegation therein that the plaintiff and other like bondholders are entitled to have the said sale proceeded with for their benefit and on their behalf, which allegation the said defendant, on information and belief, denies.

Eleventh. The said defendant, further answering on information and belief, denies the allegations of the said complaint contained in the seventeenth paragraph thereof and each and every of said allegations.

Twelfth. The said defendant, further answering on information and belief, admits the truth of the allegations contained in the eighteenth and nineteenth paragraphs of the said complaint.

Thirteenth. This defendant, upon information and belief admits that in or about the year 1880 an action was brought in this court by one Marvin Sackett, who claimed to be the owner of eight thousand five hundred dollars of the bonds so issued by the Lebanon Springs Railroad Company against the persons in that behalf mentioned in the twentieth paragraph of the said complaint, but this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations touching the various
139 proceedings had in the said suit, and other matters alleged in the said twentieth paragraph of the said complaint and in the twenty-first, twenty-second and twenty-third paragraphs thereof, or any or either of the said allegations, and he therefore leaves the plaintiff to make such proof thereof as he may be advised.

Fourteenth. The said defendant, upon information and belief, admits the allegations of the twenty-fourth paragraph of the said complaint.

Fifteenth. The said defendant, further answering, says that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth paragraphs of the said complaint or any or either of the said allegations, and he

therefore leaves the plaintiff to make such proof thereof as he may be advised.

Sixteenth. In answer to the allegations of the said complaint contained in the thirtieth paragraph of the said complaint, this defendant says, upon information and belief, that so far as this defendant, as assignee of the said defendant Duncan, the said defendant Duncan, and the defendant McCullough, as administrator of the goods, chattels and credits of the said Trenor W. Park, are concerned, it is not true, and he therefore denies that their rights and interests in the said railroad and property are subordinate to the mortgages of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and as to the claims made by the other defendants, this defendant has no knowledge or information sufficient to form a belief, and he therefore leaves the plaintiff to make such proof thereof as he may be advised.

Seventeenth. The said defendant, further answering upon
140 information and belief, denies each and every allegation in the said complaint contained not hereinbefore specifically admitted, averred or denied.

Eighteenth. The said defendant, further answering upon information and belief, avers that such interests or rights as the plaintiff ever had in or to the property of the Lebanon Springs Railroad Company, or the Harlem Extension Railroad Company, if any, were wholly extinguished and terminated by the judgments and decrees of foreclosure of the mortgages made by the said companies respectively, as alleged in the said complaint, and the sales had under said judgments and decrees and conveyances made thereupon, and that the said plaintiff has now no right, title or interest thereto or therein against the said $5,000,000 mortgage, which is still outstanding as a valid and subsisting lien thereon, or against the parties holding the same or interested therein.

Nineteenth. And this defendant, further answering, says that by an indenture bearing date the 27th day of July, 1875, duly made, executed and delivered by and between the defendant William Butler Duncan and his copartners, under the firm of Duncan, Sherman & Company, of the first part, and this defendant of the second part, the parties of the first part granted, conveyed, sold, assigned, transferred and set over unto this defendant all and singular the lands, tenements, hereditaments, goods, chattels and choses in action belonging to them as copartners, and also all and singular the lands, tenements, hereditaments, goods, chattels and choses in action belonging to them severally and individually upon certain trusts for the benefit of creditors, which said indenture was duly recorded in the office of the register of the city and county of New York, on the 28th day of July, 1875, in Liber 1331 of Conveyances, at page 379. That this defendant duly accepted the said as-
141 signment and gave the security required by law, and entered upon and still continues in the discharge of the trusts thereby created, and that as this defendant is advised and believes, the interest which the said defendant William Butler Duncan had in the said five-million-dollar mortgage, executed by the said defendants

Hull and wife and the said Charles G. Lincoln in favor of the said Trenor W. Park and the said defendant Duncan, and in the said railroad and property thereby mortgaged, passed to and became and now is vested in this defendant, as assignee under the said assignment.

The said defendant therefore prays judgment in this action, dismissing the complaint, with costs.

PETER T. BARLOW,
Attorney for Defendant William D. Shipman,
No. 35 William Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

William D. Shipman, the defendant above named, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes the same to be true.

WM. D. SHIPMAN.

Sworn to before me this 10th day of November, 1888.

FRANCIS E. PARKER,
Notary Public, N. Y. City and Co.

142 Supreme Court.

AARON R. STEVENS
against
THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and Others.

It is stipulated and admitted that at the time of the service of the answer of the above-named defendant The Central National Bank of Boston, the 26th paragraph of the complaint of plaintiff did not contain the allegations in regard to the intention of Sackett in bringing his suit which are contained in the 26th paragraph of the third amended complaint and which appear at folios 97 and 98 of the printed case commencing with the words "that said suit by said Sackett" at folio 97, and ending with the words "holders of said bonds" in folio 98; and it is hereby stipulated that the admission of the allegations contained in the 26th paragraph of the complaint at folio 118 of said printed case, being the 12th subdivision of the first paragraph of the answer of said defendant Central National Bank of Boston, is to be considered as admitting only that portion of the 26th paragraph ending with the words "allowances of the suit" at folio 97 of said printed case, and that the remaining part of said paragraph 26 shall be deemed as controverted under the second paragraph of the answer of the said defendant.

Dated June 12, 1889.

CAMPBELL & PAIGE,
Attorneys for Plaintiff.

143 Supreme Court.

AARON R. STEVENS
against
THE UNION TRUST COMPANY and Others.

It is hereby stipulated in consideration of Hale, Cowen & Bulkley's appearing as attorneys for The Massachusetts Mutual Life Insurance Company, for Peter Butler, receiver of the Pacific National bank and the other certificate-holders made defendants in the above action, that the answer heretofore interposed by the defendant The Central National Bank of Boston shall be considered as the answer of the said Massachusetts Mutual Life Insurance Company and other certificate-holders, defendants, as if they had united in said answer, and that said answer be deemed amended so far as to set up the claims of the said other certificate-holders to the certificates owned by them, and in all other respects that are necessary in order to make the said answer applicable to the case of the said other certificate-holders.

Dated February 28, 1889.

HALE, COWEN & BULKLEY,
Att'ys for Certificate-holders, Def'ts.
CAMPBELL & PAIGE, *Pl'ffs' Att'ys.*

At a special term of the supreme court of New York, held at the town hall in the village of Saratoga Springs on the 10th day of November, 1891.

144 Present: Hon. John R. Putnam, justice.

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, Andrew A. Douglass, as Trustee under the Last Will and Testament of William Henry Douglass, Deceased, and Ida S. Harrison, Plaintiffs,

against

THE UNION TRUST COMPANY OF NEW YORK, JAMES C. HULL, William Butler Duncan, John G. McCullough, as Administrator of the Goods, Chattels, and Credits of Trenor W. Park, Deceased; The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as Receiver of the Property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, The Harlem Extension Railroad, South Coal Transportation Company, The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as Receiver of the Property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing, John A. Nichols, Henry A. Tweed, as Surviving Trustee of the Creditors and Stockholders of the New York Loan and Indemnity Company; Royal E. Robbins, Barthold Schelinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndike, William F. Glidden, Ezra H. Baker, Phillip L. Moen, H. A. Whiting and Eustace C. Fitz, and William D. Shipman, as Assignee of William Butler Duncan, Defendants.

145 On reading and filing the affidavit of Edward Winslow Paige, one of the attorneys for the plaintiff and of George O. Vander Bogart, proving the service of the summons and complaint upon the defendants The Union Trust Company of New York, James C. Hull, The New York, Boston and Montreal Railway Company, William Watts Sherman, Marvin Sackett, Russell C. Root, The Harlem Extension Railroad, South Coal Transportation Company, William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Deering, John A. Nichols and Henry A. Tweed, more than twenty days since; and also proving that no one of the abovenamed defendants has appeared, or put in any answer or demurrer to the complaint in the action; and also proving that due notice of the pendency of this action was filed in the offices of the clerks of Rensselaer and Columbia counties on the 10th day of October, 1887, and that another due notice of the pendency of this action was duly filed in said office on the 24th September, 1888, and the court having computed the amount due upon the various bonds and mortgages and receiver's certificates hereinafter referred to and having

taken proof of the facts and circumstances stated in the complaint, by which computation and proof it appears that the several amounts hereinafter stated are due upon this tenth day of December, 1891, and that the facts hereinafter stated are true.

And it further appearing to the court that the following defendants have appeared and put in answers to the complaint, namely: the defendant, William Butler Duncan, by his attorney, Solomon Hanford; the defendant, John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, by his attorneys, Jennings and Russell; the defendants, Jesse Seligman and John Crosby Brown by their attorneys, Bangs, Stetson,
146 Tracy and MacVeagh; the defendant, Daniel Butterfield as receiver, by his attorneys, Goodrich, Deady and Goodrich; the defendants, The Central National Bank of Boston, Peter Butler as receiver of the property of the Pacific Bank of Boston, The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert by their attorneys, Hale and Bulkley; the defendants, William Foster, Jr., and Rowland N. Hagard by their attorney, John Yard; the defendant, The New York, Rutland and Montreal Railway Company by its attorneys, Vanderpoel, Green and Cuming; the defendant, The American Loan and Trust Company by its attorney, Delos McCurdy; the defendants, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndike, William F. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting and Eustace C. Fitz by their attorney, Robert Ludlow Fowler; and the defendant, William D. Shipman, as assignee, by his attorney, Peter T. Barlow, and the issues thus made having been regularly brought on for trial at a special term of this court held at the court-house in the city of Troy on the first day of May, 1891, and the said special term having been adjourned to be held at the town hall in the village of Saratoga Springs on the ninth day of June, 1891, and the said issues having been so then tried by virtue of such adjournment and of the written stipulation of the parties, and the court having made and filed its decision thereon in writing, containing the following findings of fact and conclusions of law and directions, for judgment, that is to say:

Facts.

1. That the Lebanon Springs Railroad Company became
147 and was created a duly organized and existing corporation, under and by virtue of the laws of the State of New York, by the filing of its articles of incorporation or association on the twenty-fifth day of March, one thousand eight hundred and fifty-two, and by the provisions of the following acts of the legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont,

d to provide means therefor," passed March 8, 1853, and being apter 25 of the laws of that year;

"An act to amend an act entitled 'An act to authorize the Lebanon rings Railroad Company to construct an extension of its road to Massachusetts and Vermont, and to provide means therefor, ssed March 8, 1853,'" passed June 24, 1853, and being chapter 1 of the laws of that year;

"An act to enable certain connecting railroad companies to aid the construction of the Lebanon Springs railroad," passed April , 1855, and being chapter 350 of the laws of that year;

"An act to extend the time for the completion of the Lebanon rings railroad," passed March 23, 1857, and being chapter 150 the laws of that year;

"An act to extend the time for the completion of the Lebanon rings railroad," passed April 12th, 1860, and being chapter 285 of e laws of that year.

"An act to extend the time for the completion of the Lebanon rings railroad," passed April 22, 1862, and being chapter 444 of e laws of that year.

"An act to amend the charter of the Lebanon Springs Railroad mpany," passed April 9, 1864, and being chapter 145 of the laws that year.

"An act to authorize any town in the counties of Columbia or Rensselaer to aid in the completion of the Lebanon Springs railroad," passed April 4, 1866, and being chapter 373 the laws of that year.

"An act to extend the time for the completion of the Lebanon rings railroad," passed 26th February, 1867, and being chapter of the laws of that year.

And by virtue of the same it became vested with all the powers d franchises of corporations stated in the Revised Statutes of New ork, and of railroad corporations stated in "An act to authorize e formation of railroad corporations, and to regulate the same," ssed by the legislature of New York, April 2, 1850, and the veral acts amendatory thereof, and supplementary thereto, and ith power to purchase, construct and operate during the period of s corporate existence, and of any extensions or renewals thereof, e railroad hereinafter described, extending from Chatham Four rners, in the county of Columbia, northerly through the counties Columbia and Rensselaer to the borders of the State of — Bengton, and also with the certain other special and particular pows and franchises stated in the above acts, and also the following wers and franchises, to wit:

To exercise all the powers and authorities in respect to the conructing, holding and operating the part of said railroad within the ate of Vermont, and the managing of the business thereof, which might do if that part were within the State of New York.

To create preferred stock at such rate of dividend, or interest, and ith such securities therefor, as it might deem expedient.

To extend its road by construction or purchase, into the States of

Vermont and Massachusetts, as far as is or may be permitted by the authority of said States.

149 To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate, either itself alone or after consolidation with any other company into a single corporation, with any company having a railroad, or the right to construct a railroad which, or a portion of which should be within the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in an act entitled "An act to authorize the consolidation of certain railroad companies," passed by the legislature of New York, April 2, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which it might construct or acquire within the States of Vermont and Massachusetts, as it might exercise if the same were wholly within the State of New York.

To have its stocks and bonds taken and owned or guaranteed by any company having or being authorized to construct a railroad connecting with the line of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of its railroad from the Massachusetts State line as declared in its articles of association to any point within the town of Hoosick, in the county of Rensselaer, or the town of White Creek, in the county of Washington.

150 To construct a branch to a terminus at the Vermont State line, at a point of junction with the Western Vermont railroad, now known as the Bennington and Rutland railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same effects as if the line of the said company had been originally fixed in its articles of association both as to its main line and branches as the same are last above described, and the termini thereof had been its original terminus.

That by virtue of the following acts which were duly passed by the legislature of the State of Vermont, to wit:

"An act to incorporate the Vermont and New York Railroad Company," approved November 2, 1865, and being No. 134 of the laws of that year;

"An act to amend an act entitled 'An act to incorporate the Vermont and New York railroad,' approved November 2, 1865," approved November 19, 1866, and being No. 167 of the laws of that year;

"An act authorizing the Bennington and Rutland Railroad Company to consolidate their road with the road of the Lebanon Springs

Railroad Company," approved November 21, 1867, and being No. 155 of the laws of that year;

"An act to enable the Bennington and Rutland Railroad Company to aid in obtaining necessary railroad connections," approved March 28, 1867, and being No. 2 of the special session laws of that year, the Vermont and New York Railroad Company was incorporated with the powers and franchises of railroad corporations under the laws of Vermont, and to build, own and operate a railroad from Bennington to the Vermont State line, being that portion of the railroad hereinafter described which is within the State of Vermont, and to transfer and convey such powers and franchises and any property to the said Lebanon Springs
151 Railroad Company, and to consolidate by a vote of a majority of its stockholders, with the Lebanon Springs Railroad Company.

That said company was duly organized, and its road duly located and the construction thereof commenced.

That afterwards, on or about the twentieth day of August, 1867, the Vermont and New York Railroad Company, by its deed of conveyance of that date, in all respects duly authorized, executed, acknowledged and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebanon Springs Railroad Company the said Vermont and New York Railroad Company so located as aforesaid, with all its privileges and appurtenances and all the rights and franchises of said Vermont and New York Railroad Company.

The Lebanon Springs Railroad Company constructed the said railroad from Chatham to Bennington, hereinafter described, including the completion of the Vermont and New York railroad, and completed the same and opened it to the public early in the year 1869, and, except as otherwise hereinafter alleged, has always and ever since operated the same as a railroad.

And it also became possessed and the owner of the following-described property, to wit: All and singular the track or roadway of the Lebanon Springs railroad, from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said The Lebanon Springs Railroad Company already built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also
152 all the tools, incomes, rents, issues and profits of any and all of the same, and of any and all of the above-mentioned powers and franchises; and also all the rolling stock, locomotives, tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars, and also the Vermont and New York railroad constructed from the terminus of the rail-

road last above described in the town of Hoosick aforesaid to the village of Bennington, in the State of Vermont, including all the equipment and all the above-mentioned powers and franchises of the said Vermont and New York Railroad Company belonging to or in anywise appertaining to, or which may at any time belong or appertain, or have belonged or appertained to the same or either of said railroads or companies as well in law as in equity; including also all property of every kind, name or nature, or purchased by or in the possession of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company and John W. Van Valkenburg as receiver; and including also all property, powers and franchises of every name and nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867.

That none of the above-mentioned rights, powers and franchises have lapsed, been lost, forfeited or expired, but all of the same are still in full force and life and subject to the lien of the above mortgage and will pass in like full force and life to any purchaser or purchasers on a sale under such mortgage and to any new corporation organized by such purchaser or purchasers pursuant to the laws of New York.

153 That the Lebanon Springs Railroad Company possessed and enjoyed all the powers, rights and franchises above mentioned until it became consolidated with the Bennington and Rutland Railroad Company as hereinafter declared.

That on the first day of July, 1867, the said Lebanon Springs Railroad Company duly issued and sold its bonds to the amount of two millions of dollars to individuals and to towns.

That to secure the payment of said bonds the said Lebanon Springs Railroad Company on the first day of July, 1867, duly executed and delivered to the defendant The Union Trust Company of New York, a corporation organized and then and still existing under the laws of New York, its certain mortgage bearing date on that day, whereby it duly mortgaged all its property, rights, powers, and franchises, including all the premises, property, rights, powers and franchises hereinabove stated to the said Union Trust Company of New York, in trust, to secure the payment of the said bonds.

That said bonds bore interest at the rate of seven per centum per annum, payable on the first day of January and July in each year, and the principal in thirty years from the date thereof.

That said mortgage was at the time of the foreclosure and sale hereinafter mentioned, the first mortgage and lien upon all the said property, powers and franchises, and contained a proviso in substance the same as the condition of the said bonds, and with power and authority in case of default in the payment of the principal, or of the interest thereon, as therein specified, to sell the said mortgaged property in due form of law; and also contained the following:

"And should the said trustee fail to forthwith take possession of said railroad and the mortgaged property and operate the same as

hereinbefore authorized, any holder of any of said bonds se-
154 cured by this mortgage may apply in behalf of himself and the other holders of the bonds hereby secured to the supreme court on notice to the party of the first part and to the said trustee under this mortgage or its successors, or by action or otherwise as the said court may direct, for the appointment of a receiver of the said mortgaged premises and property, and on such application the said supreme court may appoint such receiver with the powers as are herein conferred upon said trustee, and as appertain to receivers in such cases, and said trustee shall have the like power to apply for a receiver, and should the said trustee neglect or refuse after January first, one thousand eight hundred and sixty-nine, to institute an action for the foreclosure of this mortgage, or to prosecute such action or the proceedings for such sale with due diligence it shall be lawful for any holder of any of the bonds hereby secured to apply in behalf of himself and the other holders of said bonds to the said supreme court on notice to the party of the first part, and to said trustee or its successor by action or otherwise as the said supreme court shall direct for a sale of the said mortgaged premises, and on such application it shall be lawful for the said court to order such sale according to the course of practice of said court in cases of foreclosure of mortgages. But in case of any such application or action by any bondholder for a receivership, or for a sale, it shall not be lawful for any other bondholder to make a similar application or to bring a similar action while said first-mentioned application or action or proceedings therein or thereunder is or are pending."

That the plaintiff Stevens is the owner and holder of said bonds to the amount of three thousand one hundred dollars stated at par value of the principal of the same; that the plaintiff Rogers is the
155 owner of said bonds to the amount of $1,000, stated at par value of the principal of the same, and has been such owner and holder ever since the year 1867. That the plaintiff Wilbur is the owner and holder of said bonds to the amount of $1,000, stated at par value of the principal of the same and that she inherited the same from her sister, Elvira E. Peabody, 21 August, 1881. That the plaintiff, Douglass, as trustee, under the last will and testament of William Henry Douglass, deceased, is the owner and holder of said bonds to the amount of $12,400, stated at par value of the principal of the same, and as such trustee has been such owner and holder ever since 1875. That the plaintiff, Harrison, is the owner and holder of such bonds to the amount of $50,000, stated at the par value of the principal of the same.

That no part of the interest thereon nor upon any of said bonds has been paid since the year 1870.

That early in the year 1870 the Lebanon Springs Railroad Company duly consolidated its road, franchises and property with the road, franchises and property of the Bennington and Rutland Railroad Company, a corporation theretofore duly organized and existing under the laws of the State of Vermont and owning and operating a railroad from Bennington in that State, where it con-

nected with the railroad of the Lebanon Springs Railroad Company, to Rutland, in said State, and also a branch two miles long running from North Bennington westerly to the New York State line, and one company was thus formed of said two companies under the name of the Harlem Extension Railroad Company, which said last-named corporation became entitled to all and singular the rights, properties and franchises of said two railroad companies, and subject to all their and each of their respective liabilities.

That afterwards and on the first day of April, 1870, the
156 said Harlem Extension Railroad Company executed its certain bonds, amounting in the aggregate to the sum of four millions of dollars, and bearing interest at seven per centum per annum; of which, however, only the sum of one million five hundred thousand dollars *were* issued, and at the same time and to secure the payment of the said bonds it executed to the Union Trust Company of New York a mortgage upon all its property, roads and franchises, which contained a proviso in substance the same as the conditions of the said bonds. The remainder of the said bonds of the said Harlem Extension Railroad Company, being two millions five hundred thousand dollars thereof, were reserved to take up and be exchanged for the two million dollars of bonds of the Lebanon Springs Railroad Company, before mentioned, and five hundred thousand dollars of bonds which had been issued by the said Bennington and Rutland Railroad Company, but such bonds of the Lebanon Springs Railroad Company and the Bennington and Rutland Railroad Company were never surrendered or exchanged and accordingly only one million five hundred thousand dollars of the said bonds of the Harlem Extension Railroad Company were ever issued as above stated.

That the plaintiff Stevens is the owner and holder of said bonds to the amount of five thousand dollars, stated at par value of the principal of the same; and that the plaintiff, Douglas, as trustee, under the last will and testament of William Henry Douglas, deceased, is the owner and holder of said bonds to the amount of $1,000, stated at par value of the principal of the same.

That the interest upon the said bonds of the Lebanon Springs Railroad Company was paid up to and including that due in January, 1869, but that nothing has ever been paid upon any of them since, and nothing at all has been paid upon any of the bonds issued by the Harlem Extension Railroad Company.

157 That both said mortgages were duly recorded in the clerks' offices of the counties of Columbia and Rensselaer according to the laws of the State of New York, and in the county of Bennington, in the State of Vermont, according to the laws of the State of Vermont.

That on the 22d day of February, 1872, the Union Trust Company of New York began an action in the supreme court of New York to foreclose the said mortgage, executed by the said Lebanon Springs Railroad Company, by reason of the aforesaid default in the payment of interest thereon, in which action The Lebanon Springs Railroad Company, The Harlem Extension Railroad Com-

pany, William Butler Duncan and James B. Hodgskin were made defendants. That due notice of the pendency of said action, according to the law and the practice of that court, was duly filed in the offices of the clerks of the counties of Rensselaer and Columbia on the 24th day of February, 1872, and that all the defendants in such action were duly and regularly served with the process of this court, and subjected to the jurisdiction thereof, and duly and regularly appeared in such action therein, prior to the first day of May, 1872.

That on or about the 15th of November, 1872, it filed bills in the court of chancery in the State of Vermont to foreclose both of the said mortgages, in which actions The Lebanon Springs Railroad Company and The Harlem Extension Railroad Company were made defendants, which defendants were regularly served with process and submitted to the jurisdiction of, and appeared in that court, in both such actions, prior to the first December, 1872.

While the above-mentioned actions were pending, and on the 18th December, 1872, the Harlem Extension Railroad Company and the Pine Plains and Albany Railroad Company, a corporation duly existing under the laws of the State of New York, duly
158 consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of the Harlem Extension Railroad Company; and certain other railroad companies then existing under the laws of the State of New York, namely, the New York and Boston Railroad Company, the Putnam and Dutchess Railroad Company and the Dutchess and Columbia Railroad Company, on the 18th December, 1872, duly consolidated their roads, property, franchises and capital stock and thus formed one company under the name of the New York, Boston and Northern Railway Company, and afterwards and by an agreement made the 19th December, 1872, but not filed in the office of the secretary of state of New York, until 21st of January, 1873, the said last named the Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of The New York, Boston and Montreal Railway Company, which is one of the defendants herein.

That such several consolidations were legal and duly and strictly in accordance with the laws of New York and Vermont, and the defendant, The New York, Boston and Montreal Railway, became thereby the owner of and entitled to all the roads, property and franchises of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as hereinbefore stated, subject to the said mortgage given by the Lebanon Springs Railroad Company and also of all the other mortgages above named, and subject to all of their and each of their respective liabilities, and to the pendency of said actions.

That the above-mentioned foreclosure suits were proceeded with, and such proceedings had therein that, in the said action
159 in the supreme court of New York, judgment of foreclosure of the said mortgage given by the Lebanon Springs Railroad

Company, and for a sale of all the road, property, powers and fran chises of the Lebanon Springs Railroad Company within this State was duly rendered by said court in that action, and was on the same day duly entered in the clerk's office of Rensselaer county which said judgment is in the words and figures following:

At a special term of the supreme court of the State of New York held at the court-house, in the city of Troy, county of Rensselaer on the 10th day of December, 1872.

Present: Hon. William L. Learned, justice.

UNION TRUST COMPANY OF NEW YORK, as Trustee,
against
THE LEBANON SPRINGS RAILROAD COMPANY, THE HARLEM Extension Railroad Company, William Butler Duncan, James D. Hodgskin.

On reading and filing the affidavit of S. T. Fairchild, attorney for the plaintiff in this action, proving the service of the summons and notice of object of suit in this action, and the affidavit of said attorney for the plaintiff that no answer or demurrer has been put in to the complaint in said action, and that due notice of the pendency of this action was duly filed in the offices of the clerks of the counties of Rensselaer and Columbia, on the 24th day of February, 1872, and on reading and filing the report of the referee to whom it was referred by an order of this court to compute the amount
160 due to the plaintiff upon the bonds and mortgage mentioned and set forth in said complaint, by which report bearing date the 10th day of December, 1872, it appears that the sum of five hundred and fifty-two thousand two hundred and twenty-two dollars and twenty-two cents was actually due upon said bonds and mortgage at the date of said report for interest, and that the further sum of two millions of dollars will become due to said plaintiff on the first day of July, 1891, for principal upon said bonds and mortgage, besides interest thereon from the date of said report; and on motion of S. T. Fairchild, attorney for the plaintiffs—

It is ordered, that the said report be and the same hereby is in all things confirmed, and on like motion as aforesaid it is adju-ged that the mortgaged property and premises described in the complaint in this action as hereinafter set forth, be sold together and not separately, at public auction in said county of Rensselaer, by or under the direction of Charles S. Fairchild, who is hereby appointed as referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that either of the parties to this action may purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the property and premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold at the time he pay to the plaintiff or its attorney the sum to be taxed hereby adjudged to the plaintiff for costs and

charges in this action from the date hereof, which costs have this day been adjusted and taxed by the clerk of said county of Rensselaer, as ninety-seven dollars and forty-nine cents, and that
161 he also pay to the plaintiff the amount so reported due as aforesaid, together with the legal interest thereon, from the date of the said report, or so much of the purchase-money of the mortgaged premises will pay of the same, take a receipt therefor and file it with his report of sale; and he deposit the surplus money, if any, with the Union Trust Company of New York to the credit of this action, to be drawn only on the order of this court, signed by the clerk and judge thereof within five days after he receives the same; that he make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff with the interest and costs as aforesaid the said referee specify the amount of such deficiency in his report of sale; and that the defendant, The Harlem Extension Railroad Company pay the same to the plaintiff, and that the purchaser or purchasers at such sale be let into possession on production of the said deed.

And it is further adjudged, that the defendants and all persons claiming under them, or any or either of them, after the filing of the aforesaid notice of pendency of this action be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

The following is a description of the mortgaged property and premises hereinbefore mentioned, as contained in said mortgage, viz:

"All the right, title and interest of the said party of the first part of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all lands hereafter to be acquired for the
162 purpose of forming said track or roadway, also the railroad of the said party of the first part now built and to be built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings, and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part connected with said railway or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow-ploughs and scrapers, all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may

have or may hereafter acquire of, in and to the Vermont and New York railroad constructed, or to be constructed, from the terminus of the railroad of the party of the first part, in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining or which may at any time belong or appertain to the same as well in law as in equity.

Granted Dec. 10, 1872.

W. L. L.

Filed Dec. 10, 1872, at 11 h. 30 a. m."

Under said judgment the property and franchises therein
163 described were sold on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by said court in that behalf, at Greenbush, in the county of Rensselaer, to the defendant, William Butler Duncan, for the price of one hundred thousand dollars, and said referee thereupon, by the direction of the said Duncan executed and delivered to the defendant, James C. Hull, his deed of the said road, property and franchises, bearing date the said 25th January, 1873, and said deed was duly recorded in the clerks' offices of Rensselaer and Columbia counties.

On the seventh day of December, 1872, a decree of foreclosure of the same mortgage, and also a decree for the foreclosure of the Harlem Extension mortgage, and directing a sale of all the roads, property, powers and franchises within the State of Vermont of the Lebanon Springs Railroad Company, and the Vermont and New York Railroad Company, as set forth in the first finding above, were duly passed by the court of chancery of Vermont, and enrolled and filed in that court as aforesaid; that said decree in the first of such actions was in the words and figures following:

Decree.

STATE OF VERMONT, }
Bennington County. }

December Term.

THE UNION TRUST COMPANY OF NEW YORK
against
THE HARLEM EXTENSION RAILROAD COMPANY and THE LEBANON SPRINGS RAILROAD COMPANY. } In Equity.

Decree.

And now upon the orators' bill in this cause on file, setting forth the charter of the Vermont and New York Railroad Com-
164 pany, the location and partial construction of the Vermont and New York railroad, extending from the village of Bennington, in the county of Bennington, to the State line between Vermont and New York, at Hoosick, in the county of Rensselaer

and State of New York; the due conveyance of said road to the Lebanon Springs Railroad Company, its completion so as to connect the Lebanon Springs railroad at said Hoosick with the Bennington and Rutland railroad at Bennington; the consolidation of the stocks, franchises and property of said Lebanon Springs Railroad Company, and of said Bennington and Rutland Railroad Company, and the formation thereby of the Harlem Extension Railroad Company; the execution by said Lebanon Springs Railroad Company before said consolidation of a mortgage of said Vermont and New York railroad to the orators as trustees to secure the payment of the bonds of said Lebanon Springs Railroad Company and the interest thereon; the non-payment of said interest when due, and the forfeiture thereby of the condition of the said mortgage, and upon due appearance of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company by their respective solicitors, said bill having been taken as confessed, and the cause having been referred to a master to ascertain the amount due under said mortgage, by whose report on file it appears that there is due of unpaid interest under said mortgage the sum of four hundred and ninety thousand dollars, all which by the files, records and entries in this cause in this court remaining, and which are hereby referred to as the basis of this decree, will more fully and at large appear.

It is ordered, adjudged and decreed by the court at this term that the said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company pay to the orators as trustees the said sum of four hundred and ninety thousand dollars, with in-
165 terest hereafter to accrue, and the costs of this suit taxed at the sum of thirty-one dollars and thirty-five cents, before the 20th day of January, 1873.

And in default of such payment that all the said mortgaged property, namely, the said railroad formerly known as the Vermont and New York railroad, its rights, privileges and appurtenances, and all the franchises to possess, own, maintain and operate the same and all the right, title, estate and interest of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company therein, shall be sold at public auction to the highest bidder, for cash, on the 20th day of January, 1873, at two o'clock in the afternoon, at the court-house in Bennington, in the county of Bennington, to satisfy this decree.

And David McEowen, Esq., of Bennington, is hereby appointed a special master in chancery to conduct and make said sale.

And he is hereby directed to give notice of said sale by advertising the same and the substance of this decree once a week for five weeks next preceding said sale in the Bennington Banner, newspaper, published at Bennington aforesaid; in the Manchester Journal, newspaper, published at Manchester, in said county of Bennington; in the Rutland Herald, newspaper, published at Rutland, in the county of Rutland; and in the New York Daily Times, published in the city of New York.

And to hold said sale at the time and place appointed, in conformity with the direction of this decree and the terms of said ad-

vertisement, and to sell said mortgaged property and franchises to the highest bidder, for cash, at fair public vendue and to execute a suitable and sufficient conveyance thereof, to the purchaser, which shall recite the substance of this decree, and the proceedings under it, and shall be executed in the manner required by the laws of the State.

166 And said master shall make due and full return of his proceedings to this court, and shall pay into court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and prove their claims under the direction of the court.

And if said proceeds shall be more than sufficient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the court upon application of parties in interest.

And said master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as may be allowed by the court upon his application.

And the orators shall be allowed from said fund their just charges and expenses.

Done in court at said Bennington, this 6th day of December, 1872.

HOYT H. WHEELER, *Chancellor.*

E. J. PHELPS,
Solicitor for Orators.

This decree is certified to be in due form and correct.

E. J. PHELPS, *Solicitor.*

Filed in court, December 7th, 1872.

JOHN V. HALL, *Clerk.*

And that said decree in the second of said actions was in the words and figures following:

167 *Decree.*

STATE OF VERMONT, }
Bennington County. }

THE UNION TRUST COMPANY OF NEW YORK
against
THE HARLEM EXTENSION RAILROAD COMPANY. } In Equity.

Decree.

And now, upon the orators' bill in this cause on file, setting forth the formation of the said Harlem Extension Railroad Company by consolidation of the Bennington and Rutland Railroad Company of Vermont and the Lebanon Springs Railroad Company of New York, by agreement and proceedings therein referred to and stated. And further setting forth the due execution by said Harlem Extension Railroad Company to the orators as trustees of a mortgage of the

consolidated railroads, franchises and property belonging to said Harlem Extension Railroad Company, to secure the bonds or notes of said company and the interest thereon. The issue and sale of said bonds and the non-payment of the interest thereon when due and that the principals of said bonds had thereby become due.

And praying for a foreclosure of said mortgage, and a sale of said mortgaged property and franchises so far as the same are in the State of Vermont. And upon due appearance for said Harlem Extension Railway Company by their solicitor, said bill having been taken as confessed, and the same having been referred to a master to ascertain the amount due, whose report has been filed, all which by the filed records and entries in this cause now in
168 court remaining, and which are hereby referred to as the basis of this decree, will more fully and at large appear.

It is ordered, adjudged and decreed by the court, at this term, that the said Harlem Extension Railroad Company pay to the orators, as trustees, under said mortgage, the sum of one million six hundred and fifty-seven thousand five hundred dollars, being the amount so shown by said master's report to be due under said mortgage, together with the interest to accrue thereon, and the costs of this suit, before the 20th day of January, 1873. Said costs being taxed at the sum of thirty-one dollars and thirty-five cents.

And that in default of such payment, all the railroads, property and franchises covered by said mortgage, so far as the same lie or exist within the State of Vermont, being the said Bennington and Rutland railroad, and said Vermont and New York railroad, with all their and each of their lands, privileges, appurtenances, rights, premises and property of every description in the State of Vermont, and all the right, title, interest and estate of said Harlem Extension Railroad Company therein, and all the franchises of said company to be a corporation, and to have, own, maintain and operate said railroads, so far as derived under the laws of Vermont, be sold at public auction for cash, to the highest bidder, on the 20th day of January, 1873, at ten o'clock in the forenoon, at the court-house at said Bennington.

And Daniel McEowen, Esq., of Bennington, is hereby appointed a special master in chancery to conduct said sale.

And he is directed to give notice of said sale by advertising the same and the substance of this decree weekly, once a week for five weeks *in the* next preceding said sale in the Bennington Banner, newspaper published at said Bennington; in the Manchester
169 Journal, newspaper published at Manchester, in said county of Bennington; in the Rutland Herald, newspaper published at Rutland, in the county of Rutland, and in the New York Daily Times, newspaper published in the city of New York. And to hold said sale at the time and place appointed, in conformity with the directions of this decree and the terms of said advertisement, and to sell said mortgaged property and franchises to the highest bidder for cash at fair public vendue. And to execute a suitable and sufficient conveyance thereof to the purchaser, which shall recite

the substance of this decree, and the proceedings under it, and shall be executed in the manner required by the laws of this State.

And said master shall make due and full returns of his proceedings to this court, and shall pay into court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and prove their claims under the direction of the court. And if said proceeds should be more than sufficient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the court upon the application of parties in interest.

And said master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as the court on his application shall direct.

Said sale to be subject to the rights of the orators, the said Union Trust Company, as trustees under a certain mortgage of the Bennington and Rutland railroad, made by the Bennington and Rutland Railroad Company on the 15th day of August, 1867, to secure the sum of five hundred thousand dollars in the bonds of said company.

Done in court at Bennington this 6th day of December, 1872.

HOYT H. WHEELER, *Chancellor.*

E. J. PHELPS,
Solicitor for Orators.

170 This decree is certified to be in due form and correct.

E. J. PHEL*HS*, *Solicitor.*

And under and in pursuance of such decrees the said road, property, powers and franchises within the State of Vermont, were, by Daniel McEowen, a special master in chancery, appointed by the said court, for that purpose, on the 20th of January, 1873, sold to Charles G. Lincoln, of Bennington, Vermont, for the sum of fifty thousand dollars, and that the said special master executed and delivered to the said Charles G. Lincoln deeds of said road, property, powers and franchises bearing date the said 20th January, 1873, and said deeds were duly recorded in the office of the clerk of the county of Bennington, Vermont, on the 22d January, 1873.

That no part of either of said sums of one hundred thousand dollars and fifty thousand dollars has ever been paid; and that the Union Trust Company has never done anything to enforce such payment, nor anything under either mortgage since. On the 28th January, 1873, the said defendants Hull and Lincoln, without any consideration, executed and delivered to the defendant Duncan and one Trenor W. Park a bond conditioned for the payment of five millions of dollars, on or before the first of August, 1873, with interest at seven per centum per annum, and also they and the defendant Mulissa A. Hull executed and delivered to said Duncan and Park a mortgage to secure the payment of the same conveying all the roads, property, powers and franchises of the Harlem Extension Railroad Company, including those of the Lebanon Springs Rail-

road Company and the New York and Vermont Railroad Company in both States, as hereinbefore set forth. Said mortgage was recorded in the offices of the clerks of Rensselaer and Columbia counties, on the 14th February, 1873, and in the clerk's office of Bennington county, Vermont, on the first May, 1873.

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That said Park and Duncan both then knew that the consideration for the deeds upon said sales in said actions remained unpaid.

That on the 30th January, 1873, the defendants James C. Hull and Melissa A. Hull, his wife, by their deed executed and delivered on that day, without any consideration, conveyed all said roads, property and franchises, situated in the State of New York, to the defendant The New York, Boston and Montreal Railway Company, subject, however, to said mortgage, to said Duncan and Park; which deed was then duly recorded in Rensselaer and Columbia counties; that at the same time the defendant Lincoln, by a deed executed and delivered by him, likewise for no consideration, conveyed said roads, property and franchises situated in the State of Vermont to the New York, Boston and Montreal Railway Company, subject, however, to said mortgage to Duncan and Park, and said five-hundred-thousand-dollar mortgage on the old Bennington and Rutland railroad, which deed was then duly recorded in Bennington county, Vermont.

That the said five-million-dollar mortgage made to Duncan and Park represented substantially the aggregate indebtedness, being the aforesaid bonds of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, which the defendant The New York, Boston and Montreal Railway Company was to assume and pay according to the terms of the consolidation agreement by which it was formed, and of the above-mentioned other agreements and arrangements under which the property of said Harlem Extension Railroad Company was to be acquired by said New York, Boston and Montreal Railway Company, as before stated, and was made in order to secure and maintain a lien upon the said premises, for the payment of such indebtedness, and that in accordance with such arrangement an agreement was made on or about February 11, 1873, between the defendant The New York, Boston and Montreal Railway Company and the said Duncan and Park, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company to the defendant Duncan, who was to have the custody of said moneys and to disburse the same, to secure the payment and discharge of the aforesaid five-million-dollar mortgage, and that in pursuance of said agreement and other agreements and arrangements relating to the same matter, the said bond and mortgage, together with a satisfaction thereof, in writing, were placed in the custody of Jesse Seligman and John Crosby Brown, two of the trustees in said agreements mentioned, who were in accordance with the provisions of the said agreements and arrangements and were authorized by power of attorney to receive and to endorse upon said bond the payments that should be made thereon, and upon full payment thereof, if within the time stipulated, to file

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said satisfaction piece and thus discharge said mortgage of record, but in case of a failure by said company to pay the full amount due on or before the first day of August, 1873, to redeliver such bond and mortgage with the satisfaction piece to the mortgagees. But in and by said agreements and arrangement- it was further provided that if the said company should fail to pay for the reasons therein mentioned, the amount due upon said bond and mortgage on or before August 1, 1873, that then upon certain conditions the payment of such sum should be extended for eighteen months from said first day of August, 1873.

That said last-named company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which long since and on or before February 1, 1875, became wholly
173 due and payable; but wholly failed to pay on or before said last-mentioned day, or at any other time, the remainder, being much the larger part of the sum due upon said bond and mortgage, and has never paid the same, nor any part of the same, and has never completed its railroad, and has become insolvent and abandoned its undertaking, and is wholly unable to pay the same or any part thereof. The defendant Daniel Butterfield was appointed by the supreme court of the State of New York receiver of all its property and effects, on or about the 15th day of April, 1875, and that he has never taken any action whatever towards completing said railroad, or carrying on its enterprise or fulfilling its obligations, but has wholly failed to do so.

That during the year 1873 the New York, Boston and Montreal Railway Company executed and delivered a certain mortgage to secure bonds to the aggregate amount of twelve million two hundred and fifty thousand dollars to the defendants Seligman, Sherman and Brown. Said mortgage was recorded 15th March, 1873, in Rensselaer county, in Book 138 of Mortgages at page 1, and covered the above-mentioned railroad and other things. On the first day of April, 1873, said New York, Boston and Montreal Railway Company executed and delivered another certain mortgage to secure other bonds, to the aggregate amount of twelve millions seven hundred and fifty thousand dollars to the New York Loan and Indemnity Company. Said mortgage was recorded in Rensselaer county, 26th June, 1873, in Book 140 of Mortgages at page 21, and conveyed the above-mentioned railroad and other things. The said New York Loan and Indemnity Company was a corporation created and then existing under the laws of New York on the 19th April, 1877, and by a judgment of this court said New York Loan and Indemnity Company was dissolved and the defendants Wil-
174 liam H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, John A. Nichols, Charles H. Dewing, Timothy Cornwall, John H. Cheever, Henry A. Tweed and one Reuben W. Van Pelt, and one Andrew McKenny, who have since died, were its directors at the time of such dissolution.

That enough of the bonds of the said last two mortgages were sold in Europe to realize six millions of dollars, which was received

and disbursed by the defendants Seligman and Brown under Exhibit 20.

That afterwards a bill was duly filed in the court of chancery of the State of Vermont, where a portion of the mortgaged premises are situated, for the foreclosure of said mortgage made by Hull and Lincoln for $5,000,000 against the defendants James C. Hull, Melissa A. Hull, his wife, Charles G. Lincoln, The New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver of the property and effects of the New York, Boston and Montreal Railway Company. Subpœnas duly issued therein with the said bill were duly served upon said defendants and such proceedings were afterwards had therein that in the year 1883 a decretal order was entered therein foreclosing said mortgage and directing a sale of the whole of said mortgaged premises, and that this plaintiff and other like bondholders are entitled to have said sale proceeded with for their benefit and on their behalf.

That the said railroad hereinafter described was operated by and on behalf of the New York, Boston and Montreal Railway Company until some time in November, 1873, when said company leased said road to the Central Vermont Railroad Company, by which it was operated until 20th August, 1877, when it withdrew from the possession of and abandoned the same.

That in the meantime the said New York, Boston and Montreal Railway Company had failed to fulfill its obligations and became insolvent and abandoned its enterprise as hereinbefore found, and said Lebanon Springs railroad when surrendered and abandoned by its lessee, lay unoccupied and unoperated until some time in September, 1877, when it was taken possession of by one Russell C. Root.

That the possession of said road was subsequently delivered by said Root to a corporation called the "Harlem Extension Railroad South Coal Transportation Company," a corporation which was organized under the general manufacturing laws of New York by the said Root, who was its first president, and continued to be its president until said road came into the possession of John W. Van Valkenburgh as receiver as hereinafter stated.

That on the 27th of November, 1887, said Root delivered possession of said property to said last-named company, which continued in possession of and operating the same until said road came into the possession of John W. Van Valkenburgh, as hereinafter stated.

That on the 7th of September, 1889, one Marvin Sackett, who claimed to be the owner of bonds, issued by said Lebanon Springs Railroad Company, to the amount of $8,700, brought an action in this court against the said Russell C. Root and the said Harlem Extension Railroad South Coal Transportation Company, and also against the said New York, Boston and Montreal Railway Company, and against the said Daniel Butterfield as its receiver.

In his complaint he alleged that he brought the action "in behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who hold any of the two millions of dollars of the bonds of the Lebanon Springs Railroad

Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit." He prayed for the sale of the whole of the said railroad property and franchises.

176 He alleged in his complaint the fact of the mortgage to secure his bonds among others to the Union Trust Company of New York, its actions to foreclose the sales under them, and the non-payment of the purchase-money.

He did not make the Union Trust Company of New York a party to the action.

He alleged in his complaint the aforesaid sales to Hull & Lincoln and their mortgage to Park & Duncan as aforesaid, and their conveyance to the New York, Boston and Montreal Railway Company as aforesaid. And that Hull and Lincoln and Park and Duncan acted throughout all those matters as the "agents" and the "representatives," and "for the use and benefit," and for the "sole benefit and advantage" of the Lebanon Springs bondholders; and that the mortgage was given to Duncan and Park "for" those bondholders, and that Park and Duncan held the property as "trustees" for those bondholders. He did not make either Park or Duncan or Hull or Lincoln parties to the action. He did not make any of the trustees under the two mortgages for twenty-five millions of dollars parties to the action, nor the trustee of the aforesaid mortgage of the Harlem Extension Railroad Company.

The summons and complaint in that action were served upon the New York, Boston and Montreal Railway Company 7th September, 1880, and upon Daniel Butterfield as such receiver, 23d September, 1880. They both made default and have never done anything.

The summons and complaint were served upon Russell C. Root and the Harlem Extension South Coal Transportation Company 7th September, 1880. They put in joint answers 25th September, 1880, which are in evidence.

The plaintiff did not bring the action to trial until the tenth of October, one thousand eight hundred and eighty-four.

177 He proceeded as follows:

On the first of October, 1880, he moved for the appointment of a receiver, which motion being opposed by nobody, was granted, and John Van Valkenburgh was appointed.

This order was filed 7th October, 1880, and Van Valkenburgh's bond was filed 11th October, 1880. On the twentieth October, 1880, Root and the Harlem Extension Railroad South Coal Transportation Company abandoned the road. On the twenty-fifth October, 1880, Van Valkenburgh proceeded to borrow twenty-five thousand dollars without giving any notice to anybody. On the twelfth November, 1880, one Bloodgood and six others claiming to own a majority of the Lebanon Springs bonds, and who did own more than three hundred thousand dollars of the same, noticed a motion to be made parties to the action. This motion was heard on the 27th November, 1880, and was opposed by the plaintiff and denied. The decision was made on the 28th December, 1880; an order was made and entered on the 10th day of January, 1881. The order denied the motion, and directed the plaintiff to serve copies of all

papers and notices of every kind on one F. L. Westbrook, who by the order was authorized and allowed to appear as counsel in behalf of the said Bloodgood and the other six bondholders, who had joined in the petition "upon all trials, hearings and motions."

Said Westbrook finally declined to act and so finally declined before the hearing upon the order for certificates of 2d April, 1881.

On or about the 6th November, 1880, said Park and Duncan made an application to the court to be made parties to the action. They alleged that they were the owners of over $300,000 of Lebanon Springs bonds, and over $600,000 of Harlem Extension bonds, and that they were the mortgagees under the mortgage made by
178 Hull and Lincoln which the complaint alleged they held as trustees for the Lebanon Springs bondholders. The application for the granting of this petition was opposed by the plaintiff, was heard on the 27th November and 10th December, 1880, and was not granted.

One Henry A. Tilden, who claimed to own thirty Lebanon Springs bonds, was associated with the said Sackett in the bringing of the action. He retained the Hon. Hamilton Harris as counsel therein, and assumed to control the action.

The application of Bloodgood and the six others was ended on the tenth January, 1881. On the 23d February, 1881, the receiver verified a petition to the court in form for instructions. But with a suggestion that he issue certificates to be made a first lien for, among other things, the "settlement of unavoidable indebtedness of the company now existing." He noticed this petition for hearing for the 5th March, 1881.

On the 5th March, 1881, the plaintiff not appearing, an order was made appointing one Jones, an expert, to examine the railroad. Said Jones made his report 19th March, 1881. On the 2d April, 1881, the report of the said Jones was presented to the court by the receiver, when, after hearing two counsel for the receiver, and nobody else appearing, the receiver was ordered to issue certificates of indebtedness to the amount of $350,000 to bear interest at six per cent. and to be a first lien upon the property. The order also appointed one Strait referee to "hear and determine all existing claims against said Lebanon Springs Railroad Company." This order was filed 4th April, 1881.

The receiver got his first money on the 10th May, 1881. On the 20th April, 1881, the plaintiff, Sackett, prepared a petition in which he says he was "obliged to collect, classify and arrange all
179 the complication of facts and place them in the hands of his counsel for the purposes of preparation to bring the said action," and he asked for $796.80 for himself and something for his counsel.

This was presented to the court on the 28th April, 1881, with notice to the receiver. And the court ordered the receiver to pay the plaintiff, Sackett, $796.80, and to pay the plaintiff's attorneys $1,200.

On the 18th May, 1881, one Andrews, who had been one of the receiver's counsel upon the application for the order for the certifi-

cates 2d April, 1881, presented a petition asking pay for his services. This was presented to the court on the 20th May, 1881, and the court ordered the receiver to pay said Andrews $900. On the sixth of June, 1881, the receiver presented a petition to the court praying for his compensation, and the court made an order allowing him five per cent. upon all sums received and disbursed.

On the 28th June, 1881, one Carpenter, appearing by the attorneys for the plaintiff, Sackett, presented a claim to the referee, Strait, for $358.75 for "services rendered at the special instance and request of the said Lebanon Springs Railroad Company." The referee gave him judgment for that sum.

On the 28th June, 1881, the plaintiff, Sackett, presented another claim to the referee, Strait, for $2,222.34 and interest for services rendered "at the special instance and request of the said The Lebanon Springs Railroad Company." This claim the referee, on the 30th of June, 1881, allowed at $3,000.04.

One Wm. F. Taylor presented a claim against the Lebanon Springs railroad to the referee Strait, who allowed it $2,500.

On the 29th June, 1881, the said Henry A. Tilden presented, through the attorneys for the plaintiff, Sackett, a claim for $23,967.37 against the former Lebanon Springs Railroad Company for moneys expended at its request, after the making of $2,000,000 mort-
180 gage. This claim the referee allowed on the 5th of July, 1881, at the whole amount.

From this time forward none of the defendants ever appear or do anything in the action. And the plaintiff does nothing until the 23d September, 1884.

On the 23d September, 1884, plaintiff's attorneys noticed the case for trial for the tenth of October, 1884. On the tenth of October, 1884, a trial was had between the counsel for the plaintiff, counsel for the Central National Bank of Boston, and other holders of certificates, and the Hon. Hamilton Harris, who had been retained by the said Henry A. Tilden for the plaintiff, and had also received from the said F. L. Westbrook authority to represent him.

As a result the court found among other things that Hull and Lincoln held the title as trustees for the bondholders, although neither was a party to the action, and judgment was rendered directing the sale of all the railroad and property in New York subject to the principal of the receiver's certificates, and directing the purchase-money to be applied in payment, first, of certain counsel fees and expenses of the receivership, and next, the interest due on the receiver's certificates, and directing any balance to be paid into court.

This was entered 27th January, 1885. The referee, after adjourning the sale three times, sold to the defendant Foster, as trustee, for $155,000. This amount of $155,000 had been made up by the receiver on the 2d June, 1885, and was composed of the following items: Counsel fees, $27,299.21; interest on certificates, $64,156.66; receiver's commissions, $15,851.56; taxes, $2,290.55, and debts of the receivership the balance.

That said Trenor W. Park died intestate 13th December, 1882, and

defendant McCullough was duly appointed administrator of
181 the goods, chattels, and credits which were of said Trenor W. Park, and filed his bond and accepted, and is acting.

That in 1886 the defendant The Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated at par of the principal of the same, brought an action in this court against the defendants Foster, Hazard, The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company. That in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates. That action was removed into the circuit court of the United States, and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates. Under that decree the railroad and property are advertised for sale.

That the New York, Rutland and Montreal Railway Company is wholly insolvent and its credit entirely exhausted.

II. The said action wherein said Marvin Sackett was plaintiff, was commenced at the request and with the concurrence of the following holders of the following bonds of the Lebanon Springs Railroad Company, amounting to about twelve hundred thousand dollars at their face value stated at the par value of the principal of the same, and counsel retained and acting for the said bondholders to the amount of about $1,200,000, drew the original complaint in said action at the request and with the concurrence of said bondholders, including said Marvin Sackett.

One Edward Crane was the owner of such bonds and was represented at the said Sacket suit, at its beginning; and during the pendency of the said action, wherein Marvin Sackett was
182 plaintiff, was the owner of said bonds issued by the Lebanon Springs Railroad Company, amounting to $700,000 face value stated at par value of the principal of the same. Said Edward Crane, while the holder of such bonds, was consulted in regard to said suit, and was represented in the said Sackett suit by the attorney and counsel who conducted the said suit in the name of said Sackett down to the time of its termination.

That the following other persons, owners of said Lebanon Springs bonds, were also associated with said Sackett in said Sackett suit and were represented in the said suit by the attorney and counsel who conducted the said suit in the name of said Sackett down to the time of its termination.

Samuel J. Tilden who owned $150,000 of bonds, face value; Aaron G. Vanderpool and George W. Quintard as the executors of the last will and testament of Oliver Charlick who owned $62,000 of bonds, face value; Henry Blood, who owned $10,000 of bonds, face value; one Delancey, who owned $25,000 of bonds, face value; Augustus Schell who owned $75,000 of bonds, face value; Henry A. Tilden who owned $30,000 of bonds, face value; the estate of Moses Y. Tilden, which owned less than $30,000 of bonds, face value; the estate of Horace F. Clarke, John W. Van Valkenburgh, who

owned $42,200 of bonds, face value; John L. Melchor who owned $30,000 of bond-, face value; William H. Brower who owned $10,000 of bonds, face value; L. G. Fisher who owned $10,000 of bonds, face value; Ira Thorn who owned $5,000 of bonds, face value; J. Hendricks, who owned $10,000 of bonds, face value; F. E. Blanchard who owned $5,000 of bonds, face value, in possession of Hon. Hugh McClellan; the town of Petersburgh, in Rensselaer county, which owned $20,000 of bonds, face value.

183 III. That the receiver Van Valkenburgh received from the certificates two hundred and thirty-six thousand five hundred dollars ($236,500) and no more.

IV. That he paid as follows:

Plaintiff Sackett	$769 80
" "	3,000 04
Carpenter	358 75
Taylor	2,500 00
Tilden	23,967 37
	30,622 96
Counsel	39,203 60
Referee	518 20
Receiver	22,422 91
Interest on certificates	21,009 27
	$113,807 04

V. That the suit of Sackett against Root was neither brought nor conducted for the purpose of realizing the property to the owners of the said Lebanon Springs bonds.

VI. That it was brought and conducted for the purpose of realizing out of the property certain individual claims of the said Sackett and Tilden, in preference of and at the expense of the other Lebanon Springs bondholders, which claim, if valid, were not liens upon the property and were behind the mortgage.

VII. That there is now, to wit, the tenth of November, due and unpaid upon the mortgage for five millions of dollars given by Hull and Lincoln to Park and Duncan, the sum of $4,192,922.95 with interest from first of February, 1875; and that there is now due upon the mortgages to Brown, Seligman and Sherman and the New York Loan and Indem-ity Company, the sum of six millions of dollars with interest from January 1, 1875.

184 *Conclusions of Law.*

1. That by reason of the non-payment of the purchase-money under the judicial sales in 1873, Hull and Lincoln took but a naked title in trust for the Union Trust Company as trustee for both the Lebanon Springs bondholders and by their mortgage to Park and Duncan conveyed but that naked title in trust.

2. That Duncan and McCullough as administrators of Park hold the bond and mortgage so made to them by Hull and Lincoln im-

pressed with a trust in behalf of the Union Trust Company as such trustee to the extent of the whole amount due upon it as hereinbefore found.

3. That the plaintiffs and all the other owners of Lebanon Springs and Harlem Extension bonds and the Union Trust Company of New York as trustee are entitled to have the aforesaid foreclosure judgment and decree of 1872 now enforced and the said mortgage of Hull and Lincoln to Park and Duncan now foreclosed; and all the property and franchises described in the complaint sold under and by virtue of the said judgment and decrees and the power of sale in said mortgage, to realize the said sum of $4,192,922.95 and interest and that the persons entitled under the mortgages made to Brown, Seligman and Sherman, and the New York Loan and Improvement Company are entitled to all the proceeds of the sale, beyond the said sum of $4,192,922.95, and interest up to the amount due upon those mortgages respectively; and to the balance, if any, the defendant Butterfield as receiver is entitled.

4. That the action brought in this court by Marvin Sackett was not a representative action for the reasons, first, that it was not so in fact nor intended to be, and second, because the Union
185 Trust Company was not made a party; and inasmuch as upon the face of the records of this court it professes to be the action of these plaintiffs and all other owners of Lebanon Springs bonds and to sell and dispose of all their interest and that of the Union Trust Company in the property and franchises, the plaintiffs and all the other holders of such bonds and the Union Trust Company are now entitled to have the judgment and all the proceedings in that suit, including the sale and the deed by the referee to the defendants, Foster and Hazard, reviewed and reversed, and all the property and franchises described in the complaint, together with all the interests therein of all the parties to this suit and of all Lebanon Springs and Harlem Extension bondholders sold for the purposes above stated.

5. That the holders of the certificates issued by the receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds which were in the trial and judgment in the said suit of Marvin Sackett, represented by counsel actually retained by their owners.

6. That the plaintiffs have costs of this action and an additional allowance of two thousand dollars, this being a difficult and extraordinary case.

And I direct judgment as follows:

Perpetually enjoining in the usual form all suits, similar to this, by any Lebanon Springs or Harlem Extension bondholders or by the Union Trust Company, their agents, attorneys and servants.

Perpetually enjoining in the usual form all suits to enforce any lien upon or to affect any of the said property or franchises or any interest therein by any of the holders of certificates issued by the receiver Van Valkenburgh, their agents, attorneys and servants.

Adjudging that all the franchises and powers described in

the complaint are in full life and vigor, and none of them lost or lapsed.

186 Adjudging in the usual form of a decree upon a bill of review that the judgment and all proceedings in the suit brought by Marvin Sackett, including the sale thereunder and the referee's deed, be now reviewed and reversed, and perpetually enjoining the sale in the suit by the Central National Bank of Boston.

Adjudging that the judgments and decrees of 1872 be now enforced.

Appointing a referee to sell all the said property and franchises with the usual directions upon foreclosure sales and to distribute the proceeds, and to execute the usual deed to the purchaser and adjudging that the defendants, Duncan and McCullough as administrator execute a similar conveyance of the said property, franchises and powers, and that the referee report that fact, and the facts of his own sale to the court.

Barring and foreclosing in the usual form all parties to this suit and all Lebanon Springs and Harlem Extension bondholders.

Continuing the receiver until the delivery of the referee's deed and its confirmation by the court and directing him then to deliver possession to the purchaser.

Appointing a referee, in the usual form, to determine upon the evidence already taken and the findings, and the proofs upon which the order was made 25th April, 1891, upon motion of S. A. Rockfellow and others, and such other evidence as shall be presented, who are the owners of the said Lebanon Springs and Harlem Extension bonds and receiver's certificates and which of said bonds were actually in Sackett's suit, together with the amount paid thereon; with special directions that the evidence already taken and the findings hereinbefore made shall not be conclusive as

187 against any person not a party to this suit, upon the question as to whether his bonds were actually in Sackett's suit, with the usual directions as to the giving of notice.

With the direction, usual in a final decree, that any party may apply to the court at the foot of the judgment.

And it appearing to the court that due notice has been given to Schuyler A. Rockfellow, Esq., attorney for himself and for Erastus Corning, Frederick N. Lawrence, John L. Lawrence, George N. Lawrence, James W. Walsh, Henry E. Tremain and Mason W. Tyler of the application for this judgment at this time and place,

It is now on motion of Campbell and Paige, attorneys for the plaintiffs, adjudged—

That the various computations of the amounts due and proofs of facts and circumstances taken as aforesaid be and are correct and true and confirmed.

That none of the powers and franchises hereinafter stated to have been conferred upon or enjoyed by either the Lebanon Springs Railroad Company or the Vermont and New York Railroad Company have expired, lapsed or been lost, but all are in full force and vigor.

That all owners of any of the bonds hereinbefore described issued, either by the Lebanon Springs Railroad Company, or the Harlem

Extension Railroad Company and each of them, and the Union Trust Company of New York, and their and each of their officers, agents, servants and attorneys are hereby perpetually enjoined and restrained from bringing and from proceeding with any action similar to this, and any action under either of the aforesaid mortgages, made by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company in any court whatever, and from suffering any such action to be brought or to be prosecuted or to be proceeded with in the names of any of them.

188 That all owners of any of the certificates hereinbefore described as issued by the receiver Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them.

That the judgment in the action above mentioned brought in this court by the defendant, Marvin Sackett, against Russell C. Root, the Harlem Extension Railroad, South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield its receiver, entered in Rensselaer county and dated January 12, 1885, and all orders and proceedings in that action, and the sale by the referee under such judgment, and the deed of the referee under such judgment and pursuant to such sale to the defendants Foster and Hazard, be and they hereby are reviewed and in all things reversed, vacated, set aside and held for nothing.

That the defendants, The Central National Bank of Boston, Peter Butler as receiver of the property of the Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company, and all other owners of certificates issued by the said Van Valkenburgh as receiver as

189 aforesaid and each of them and their, and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, The Central National Bank of Boston against the defendants, Hazard, Foster, The New York, Boston and Montreal Railway Company and The American Loan and Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sale to proceed in their or any of their names, or behalf.

That the judgment and decrees of 1872, be now enforced.

That all the premises, property, franchises and powers hereinafter described be sold together and not separately at public auction in

the county of Rensselaer by or under the direction of John L. Henning, of Saratoga Springs, counsellor-at-law, who is hereby appointed as referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that either or any of the parties to this action may purchaser at such sale; that the referee execute to the purchaser or purchasers a deed of the property, premises, franchises and powers sold; that out of the monies arising from such sale after deducting the amount of his fees and expenses upon such sale and any lien or liens upon the same for taxes, he pay to the plaintiffs or their attorneys the sum of two thousand dollars hereby adjudged to the plaintiffs for their costs, together with the sum of eighteen hundred & seventy-five dollars allowed to the plaintiffs by the court for an additional allowance.

That there shall be paid in cash at the time of the sale such amount as the referee may direct, and at the time of the delivery of the deed the balance of the purchase-money.

190 That the referee after the payment of the amount of his fees and expenses and the taxes and costs and allowances as aforesaid shall pay to the holders of the Lebanon Springs bonds the amount found to be due upon their respective bonds, as it shall be established by the report of such referee confirmed by the court, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit, as the same shall be found by such report as confirmed, he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy the same as the same shall be found by the said report so confirmed, and the balance to the holders of such bonds.

And he shall pay the remainder of such purchase price, if any, into court.

The aforesaid shall be made subject to a debt which the receiver has been authorized to contract to the amount of twenty thousand dollars, and to no other lien or charge whatever.

That the referee make a report of such sale and file it with the court with all convenient speed; that if the proceeds of such sale be insufficient to pay the several amounts so reported due as aforesaid, the said referee specify the amount of such deficiency in his report of sale and that the defendant, The New York, Boston and Montreal Railway Company, pay the same; and that the purchaser or purchasers, be let into possession on production of the said deed, and a certified order confirming the report of sale.

That the defendants, William Butler Duncan and John G. McCullough as administrator of the goods, chattels, and credits of Trenor W. Park, deceased, under the direction of said referee, execute and deliver to the purchaser or purchasers, a deed of all such property, premises, franchises and powers, and in conformity with the power of sale contained in the mortgage from Hull and

191 Lincoln to Park and Duncan, and that the referee specify the same in his report.

That the defendants and all persons claiming under them or any or either of them, after the filing of the aforesaid notice of the

pendency of this action, be hereby barred and foreclosed of all right, title, interest and equity of redemption in the said premises, property, franchises and powers so sold, or any part thereof.

That the receiver be and is continued until the delivery of the referee's deed and its confirmation and that he then deliver possession to the purchaser or purchasers and account to the court.

That the referee ascertain and determine and report from the evidence already taken upon this trial and the above findings, and the proofs upon which the order was made, 25th April, 1891, upon motion of S. A. Rockfellow and others, and such other evidence as shall be furnished him, who, other than the plaintiffs, are the holders of the said bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and which of them were in the trial and judgment in the said suit brought by Marvin Sackett, represented by counsel actually retained by said holders and that upon such ascertainment, determination and report, the aforesaid evidence and proofs and findings shall not be conclusive as against any person, who shall appear upon such reference and who is not now a party to this suit, upon the question as to whether his bonds were actually in the said suit so brought by Marvin Sackett. That the said referee also ascertain, determine and report, from the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of the said certificates issued by the receiver Van Valkenburgh, and how much has been paid upon said certificates, and the said referee is hereby authorized and directed to give notice by advertising in two
192 daily newspapers published, one in the city of Troy called the Troy Press and one in the city of New York called the New York Tribune, requiring the said holders of said bonds and said certificates to produce the same before the said referee at his office in Saratoga Springs, or such other place, and at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto and the amount due thereon, and the said referee is also authorized and directed to report what would be the just proportion and amount for the said other holders of said bonds to contribute to the expenses of this suit.

The following is a description of the said premises, property, franchises and powers.

All the franchises and powers conferred upon the Lebanon Springs Railroad Company, by the following acts of the legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say;

"An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont, and to provide means therefor," passed March 8, 1853, and being chapter 25 — the laws of that year;

"An act to amend an act entitled 'An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont, and to provide means there-

for, passed March 8th, 1853,'" passed June 24, 1853, and being chapter 461 of the laws of that year;

"An act to enable certain connecting railroad companies to aid in the construction of the Lebanon Springs railroad," passed April 12, 1855, and being chapter 350 of the laws of that year;

193 "An act to extend the time for the completion of the Lebanon Springs railroad," passed March 23, 1857, and being chapter 150 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed April 12th, 1860, and being chapter 285 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed April 22d, 1862, and being chapter 444 of the laws of that year;

"An act to amend the charter of the Lebanon Springs Railroad Company," passed April 9, 1864, and being chapter 145 of the laws of that year;

"An act to authorize any town in the counties of Columbia or Rensselaer to aid in the completion of the Lebanon Springs railroad," passed April 4, 1866, and being chapter 373 of the laws of that year;

"An act to extend the time for the completion of the Lebanon Springs railroad," passed 26th February, 1867, and being chapter 46 of the laws of that year.

And all the powers and franchises of railroad corporations stated in "An act to authorize the formation of railroad corporations, and to regulate the same," passed by the legislature of New York, April 2, 1850, and the several acts amendatory thereof, and supplementary thereto, and the power to purchase, construct and operate during the period of — the railroad hereinafter described, extending from Chatham Four Corners, in the county of Columbia, northerly through the counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also the certain other special and particular powers

194 and franchises stated in the above acts, and also the following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the managing of the business thereof, which might be done if that part were within the State of New York.

To create preferred stock at such rate of dividend, or interest, and with such securities therefore, as may be deemed expedient.

To extend the road by construction or purchase, into the States of Vermont and Massachusetts, as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such

terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate, either alone or after consolidation with any company into a single corporation, with any company having a railroad, or the right to construct a railroad which, or a portion of which should be within the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in an act entitled "An act to authorize the consolidation of certain railroad companies," passed by the legislature of New York, April 2, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which might be constructed or acquired within the States of Vermont and Massachusetts, as may be exercised if the same were wholly within the State of New York.

To have corporate stock and bonds taken and owned or
195 guaranteed by any company having or being authorized to construct a railroad connecting with the line of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of the railroad from the Massachusetts State line as declared in the articles of association of the Lebanon Springs Railroad Company to any point within the town of Hoosick, in the county of Rensselaer, or the town of White Creek, in the county of Washington.

To construct a branch to a terminus at the Vermont State line, at a point of junction with the Western Vermont railroad, now known as the Bennington and Rutland railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same effects as if the line had been originally fixed in articles of association both as to the main line and branches as the same are last above described, and the termini thereof had been its original terminus.

Also all power and franchises conferred by the *the* following acts which were duly passed by the legislature of the State of Vermont, to wit:

"An act to incorporate the Vermont and New York Railroad Company," approved November 2, 1865, and being No. 134 of the laws of that year;

"An act to amend an act entitled 'An act to incorporate the Vermont and New York railroad,' approved November 2, 1865," approved November 19, 1866, and being No. 167 of the laws of that year;

"An act authorizing the Bennington and Rutland Railroad Company to consolidate their road with the road of the Lebanon Springs Railroad Company," approved November 21, 1867, and being No. 155 of the laws of that year;

196 "An act to enable the Bennington and Rutland Railroad Company to aid in obtaining necessary railroad connections," approved March 28, 1867, and being No. 2 of the special session laws of that year, and the powers and franchise of railroad corporations under the laws of Vermont, and the powers and franchise to build, own and operate a railroad from Bennington to the Vermont State line, being that portion of the railroad hereinafter described which is within the State of Vermont, and to transfer and convey such powers and franchises and any property and to consolidate by a vote of a majority with railroad companies.

That said company was duly organized and its road duly located and the construction thereof commenced.

And also the following-described property, to wit: all and singular the track or roadway of the Lebanon Springs railroad, from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said The Lebanon Springs Railroad Company already built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same and of any and all of the above-mentioned powers and franchises; and also all the rolling stock, locomotives, tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads
197 and cars, and in the running of cars; and also the Vermont and New York railroad constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above-mentioned powers and franchises of the said The Vermont and New York Railroad Company belonging to or in anywise appertaining to, or which may at any time belong or appertain or have belonged or appertained to the same or either of said railroads or companies as well in law as in equity; including also all property of every kind, name or nature of or purchased by or now or heretofore in the possession of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company and John W. Van Valkenburgh as receiver, and William V. Reynolds as receiver, and including also all property, powers and franchises of every name or nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date 1st July, 1867.

That all of the powers and franchises hereinbefore enumerated, stated, or referred to are now possessed and enjoyed by the defendant, The New York, Boston and Montreal Railway Company and are herein and hereby ordered to be sold as aforesaid.

That any of the parties to this action and also the referee hereinbefore appointed, and the receiver, may hereafter apply to the court

for such further order or directions as may be proper at the foot of this judgment, and the said receiver is hereby for such purpose made a party to this action without prejudice to any proceedings heretofore taken in this action.

Enter in Rensselaer county.

JOHN R. PUTNAM, *J. S. C.*

D. E. CONWAY, *Clerk.*

198 STATE OF NEW YORK, CITY OF TROY, } *County of Rensselaer, Clerk's Office.* }

I hereby certify that I have compared the annexed copy of judgment with the original thereof filed in this office on the 11th day of November, 1891, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and [L. S.] affixed my official seal, this 16th day of November, 1891.

D. E. CONWAY, *Clerk.*

Supreme Court.

AARON R. STEVENS and Others
against
THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and Others.

GENTLEMEN: You will take notice that the defendants, The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston, and the other holders of receiver's certificates named as defendants in the above-entitled action, hereby appeal to the general term of this court from the judgment herein, bearing date the 10th day of November, 1891, and filed and entered in the Rensselaer county clerk's office, on the 11th day of November, 1891, and from the whole of said judgment.

Dated December 9, 1891.

Yours, etc., HALE & BULKELEY,
Attorneys for the Defendant The Central National Bank of Boston and the Other Defendants Certificate-holders, 25 North Pearl Street, Albany, N. Y.

199 To Campbell & Paige, Esqs., attorneys for plaintiffs.

Sol. Hanford, Esq., attorney for defendant William Butler Duncan.

Delos McCurdy, Esq., attorney for defendant The American Loan and Trust Company.

Vanderpool, Green & Cuming, Esqs., attorneys for defendant The N. Y. R. and M. Railway Company.

John Yard, Esq., attorney for defendants Foster & Hazard.

Crane, Lockwood & Fowler, attorneys for defendants Royal E. Robbins and others.

Goodrich, Deady & Goodrich, attorneys for defendants Daniel Butterfield and another.

Bangs, Stetson, Tracy & McVeagh, attorneys for defendants Brown & Seligman.

Jennings & Russell, attorneys for defendant John G. McCullough, as administrator, etc.

Peter T. Barlow, attorney for defendant William D. Shipmen.

The county clerk of Rensselaer county.

Supreme Court.

AARON R. STEVENS and Others
against
THE CENTRAL NATIONAL BANK OF BOSTON, PETER BUTLER, as Receiver of the Pacific National Bank of Boston; The Massachusetts Mutual Life Insurance Company, and Other Defendants, Holders of Receiver's Certificates, Impleaded with Others. } Case.

200 This action was commenced on or about the fourteenth day of April, 1887. The original plaintiff was Aaron R. Stevens, who alleged in his complaint that he brought his action in behalf as well of all the other owners and holders of bonds issued by the Lebanon Springs Railroad Company, and the Harlem Extension Railroad Company, and hereinafter described, who may come into the same, as of himself. The other plaintiffs herein were added by orders of the court made at different times, which order provided that the answers already served should stand as answers to the complaint as thus amended, and be allowed to deny all new allegations of such amended complaint.

The pleadings in the action are contained in the judgment-roll printed herewith.

The action was first tried at special term before Hon. Stephen L. Mayham, without a jury, who gave judgment for the defendants, which judgment was afterwards reversed by the general term, and a new trial granted therein.

The case came on for such new trial before Mr. Justice Putnam, without a jury, at his chambers in Saratoga Springs, on the 9th day of June, 1891, the parties to said action having all consented that the case should be tried before Mr. Justice Putnam in Saratoga county. The defendants in the action appeared upon said hearing by their respective counsel, except the defendants for whom Messrs. Crane, Lockwood & Fowler had appeared as attorneys, who did not appear on such hearing, being, as was stated by plaintiffs' counsel, in default.

Upon said trial the plaintiffs' counsel offered in evidence the following from the printed case used at the general term upon the appeal from the first judgment.

1. The articles of association of the Lebanon Springs Railroad Company.

2. Chapter 25 of the Laws of New York of 1853.

201 3. Chapter 461 of the Laws of 1853.
4. Chapter 150 of the Laws of 1857.
5. Chapter 350 of the Laws of 1855.
6. Chapter 285 of the Laws of 1860.
7. Chapter 444 of the Laws of 1862.
8. Chapter 145 of the Laws of 1864.
9. Chapter 373 of the Laws of 1866.
10. Chapter 46 of the Laws of 1867.
11. Chapter 134 of the Laws of Vermont for 1865.
12. No. 167 of the Laws of Vermont of 1866.
13. No. 155 of the Laws of Vermont of 1867.
14. No. 2 of the Special Laws of Vermont of 1867.
15. On behalf of plaintiff Stevens, four coupon bonds of the Lebanon Springs Railroad Company, dated July 1, 1867, three of which, Nos. 1135, 1134 and 1417, are for $1,000 each, and one, No. 2332, for $100.

Plaintiffs' counsel also, on behalf of plaintiff Stevens, offered in evidence five bonds of the Harlem Extension Railroad Company, which were objected to by the counsel for each defendant separately, on the same grounds stated in the printed case, namely, that this being an action for equitable relief, that plaintiff's title, or how he got possession of them, or when he got possession of them, should be the subject of investigation first before producing the bonds in evidence; that plaintiff should establish what is denied—the fact that plaintiff has certain equitable rights which the court of chancery can give relief upon; therefore, the reception of the
202 bonds is objected to, unless coupled with evidence touching the plaintiff's connection with them. The objection was overruled, and an exception taken by each defendant separately.

This objection was taken as well to the bonds of the Lebanon Springs Railroad Company as to those of the Harlem Extension Railroad Company offered in evidence, but the objection was overruled and the bonds were admitted in evidence, and the defendants severally excepted.

Plaintiffs' counsel also read in evidence the record in an action in equity in Vermont in which The Union Trust Company of New York was plaintiff, and The Harlem Extension Railroad Company was defendant, which action was brought to foreclose the Harlem Extension Railroad Company's mortgage dated April 18, 1870, and in which action a decree was entered December 6, 1872, directing a sale of all the railroads, property and franchises covered by said mortgage lying within the State of Vermont under the direction of Daniel McEowen, special master in chancery, appointed to conduct said sale.

Plaintiffs' counsel next read in evidence the deposition of Charles S. Fairchild, taken in the city of Washington on the 25th day of February, 1889.

The following is a copy of said deposition:

The deposition of Charles S. Fairchild, a witness produced, sworn and examined the 25th day of February, 1889, at the city of Washington, D. C., under and by virtue of a commission issued out of the

supreme court of the State of New York in a certain cause therein depending and at issue between Aaron R. Stevens, plaintiff, and The Union Trust Company and others, defendants, as follows:

CHARLES S. FAIRCHILD, now Secretary of the Treasury in the city of Washington, D. C., aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereunto annexed,
203 and examined orally on the part of the plaintiff, doth depose and say as follows:

Appearances.

Mr. Paige for plaintiff.
Mr. Joseph Larocque for defendants Sherman and Duncan.
Mr. Hale for Central National Bank of Boston.
Mr. Stetson for defendants Brown and Seligman.
Mr. Jennings for defendant McCullough, administrator.

It is stipulated that the questions and answers will be taken subject to all objections, except as to matter of form.

CHARLES S. FAIRCHILD sworn.

(By Mr. PAIGE:)

Q. Mr. Fairchild, you resided in the State of New York in the years 1872 and 1873?

A. I did.

Q. You were in those years referee in a foreclosure action in which The Union Trust Company of New York was plaintiff, and The Lebanon Springs Railroad Company, a corporation of New York, was defendant?

A. I was referee to sell.

Q. Did you so sell?

A. I did.

Q. And when and where?

A. The day I can't remember; it was at Bath, in Rensselaer county, New York.

Q. It was in the winter of 1872–'3?

A. I can't say, except from the papers; I could not say it was; I have no recollection of the matter of time whatever.

Q. Who was present at the sale?

A. My father, who was the attorney for the trust company in the foreclosure, Mr. William Butler Duncan, Mr. Park and a Shaker who came in during the sale; I do not know which of the parties were there when the Shaker came in.

204 Q. To whom was the property sold?

A. To Mr. Duncan; Mr. Duncan bought it.

Q. For how much?

A. $100,000.

Q. Was anything said as to whether Mr. Duncan was purchasing for himself individually or the bondholders of the railroad?

A. I can't recollect anything whatever which was said by anybody.

Q. What is your best recollection upon the subject?

(Mr. Larocque objects.)

A. I have no recollection of anything whatever being said, but from whatever was said I assumed that the sale was for the benefit of all interested in the property. That was the impression I had from what was said, but what was said or by whom I can't recollect.

(Mr. Larocque objects; makes motion to strike out the answer of witness as incompetent. Mr. Jennings and Mr. Stetson also object.)

Q. And that was derived from what occurred while you and Mr. Sidney Fairchild, Mr. Duncan and Mr. Park were together.

(Mr. Larocque objects to the question as leading. Mr. Jennings and Mr. Stetson also object.)

A. The impression I had was derived from the conversation I had and which I heard from those who were present; I never had any knowledge of it before; never gave any attention to the subject-matter before the night previous to the sale, and have never seen any of the parties since; saw Mr. Park and Mr. Duncan for the first time the day before the sale.

(Mr. Larocque objects.)

Q. If I understand you, the belief in your mind so derived was that Mr. Duncan was buying for the bondholders?

(Mr. Larocque objects; witness incompetent to testify; question leading. Mr. Jennings makes similar objections.)

Q. What do you understand or mean to be understood by the parties interested in the property?

(Mr. Larocque objects.)

A. I understand they were buying for the bondholders.

Q. How was the $100,000 paid?

205 A. I have no recollection in regard to the matter now; I have no recollection of my own as to how that $100,000 was paid.

Cross-examination by Mr. LAROCQUE:

Q. You executed a deed, Mr. Fairchild?

A. I presume that I did; my recollection, of course, is very dim on the subject now.

Q. Then we are to understand that you cannot at this time say positively whether you executed a deed or not?

A. I would have to be refreshed.

Q. Were you acquainted with Mr. Duncan?

A. Not until the day before the sale; he came to father's office in the Exchange building—Central railroad offices.

Q. Did you personally have any conversation about the matter at that time?

A. I was introduced to him and talked, and arrangements were made as to going over there the following day.

Q. Is it your recollection that you went together on the following day?

A. I can't recollect whether we went together or not.

Q. Do you recollect what kind of weather it was when the sale took place?

A. No, I don't remember that.

Q. Whether or not there was a snowstorm that day?

A. I don't recollect.

Q. In what kind of a place was the sale conducted?

A. I think in a small hotel in Bath.

Q. Indoors or outdoors?

A. Indoors.

Q. Are you as sure you saw Mr. Park on the occasion of this sale as you are as to any other matters as to which you have testified?

A. I am not very sure about any of it; Mr. Park is associated in my mind with this transaction; I never saw Mr. Park at any other time.

Q. Now, where did you say this sale took place?

A. I think in a small hotel in Bath.

Q. Are you able to say what hour of the day?

A. No; I think in the morning.

206 Q. And how did you go from your home to the place of sale?

A. That I can't say.

Q. Your residence was in Troy?

A. No, in Albany.

Q. How far from Albany is Bath?

A. Bath is across the river and opposite the upper part of Albany—the northern part—the width of the river between.

Q. How far from Greenbush is Bath?

A. I think three-quarters of a mile.

Q. Are they two separate and distinct places?

A. Yes.

Q. Do you recollect the company in which you went from Albany to Bath on that occasion?

A. No.

Q. And I understand you to say you have no recollection of what any one said on that occasion from which you derived that impression?

A. I have no recollection whatever.

Q. Do I understand you to say, Mr. Fairchild, that your father was attorney for plaintiff in that suit?

A. Yes.

Q. Were you connected in business with your father, or did you occupy the same suite of offices at that time?

A. No, I was in partnership with Mr. Hale at that time.

Q. How long before this sale were you advised of your appointment as referee to make it?

A. That I can't remember.

Q. Is it possible that the impression which you have stated as to the parties in whose interests the purchase was made was from conversations had before or after the sale with other persons?

A. No, I think not; I don't remember conversations; I was asked once; no, I think not; it may have been from conversations the evening before with Mr. Park and Mr. Duncan, but not before that or after the sale.

Q. Where was the sale consummated by the delivery of a deed, if deed was delivered?

A. That I can't remember.

207 Q. Do you remember who were present on the occasion?

A. No.

Q. Were you paid your fees as referee?

A. I presume I was; of that I have no recollection.

Q. And are not able to say certain that you were paid?

A. No, not certain.

Q. Did you ever make a report of the sale?

A. That I can't remember.

Q. Well, Mr. Fairchild, if it should appear that you did make, execute and deliver a deed as referee of the property sold on that occasion, and the deed recited the receipt of the consideration, would that refresh your recollection as to the fact of your having received such consideration?

A. I don't think it would.

Q. Would you, as referee, have executed and delivered a deed expressing the receipt by you of a consideration without, in point of fact, having received such consideration?

A. No; unless I had been instructed by the parties—by the plaintiff in the suit as to the kind of consideration received; I might have accepted the check; I would have under their instructions, but I would not have executed a deed unless I received something of a money consideration.

Q. In other words, I am to understand you would not have executed and delivered a deed expressing receipt of a consideration without, in point of fact, having received a check or something else which the plaintiff was content to accept as a consideration?

A. Yes.

Cross-examination by Mr. JENNINGS:

Q. If you are right in saying that Mr. Park was present at that sale he was present as a mere bystander, was he not?

A. He had no part in the sale; he was in company with Mr. Duncan.

Q. He did not bid on the property?

A. No.

208 By Mr. STETSON:

Q. Do you remember whether this Shaker who came in said anything?

A. No; I only remember the fact of the Shaker coming in.

Q. Was any such statement as you have an impression of made at the sale made in pursuance of any request from you?
A. No.
Q. Was any such statement as you have an impression of made at the sale made at the request of anybody present at the sale?
A. No.
Q. Was any action by you as referee conditional upon the making of any such statement?
A. No.
Q. Was any action there taken by any one upon the condition of such a statement being made?
A. No, not to my knowledge.
Q. Was any such statement made public there according to your recollection?
A. You mean as part of the proceedings?
Mr. JENNINGS: Yes.
A. No.
Q. Whatever statement was made was a matter of ordinary conversation?
A. Yes.
Q. And rather expressive of an intention than part of the proceedings?
A. Yes.

By Mr. HALE:

Q. Bath was at the eastern terminus of the upper bridge at Albany?
A. A little above.
Q. At that time do you remember whether there was any railroad bridge at Albany except the upper railroad bridge?
A. I think not.
Q. Your residence and office at that time were in the city of Albany?
A. Yes.
Q. And your father had offices there?
A. Yes.
Q. His residence was where?
A. Cazenovia.
Q. Your father had the entire charge of the conduct of that suit?
A. I presume so.
Q. You had nothing to do except as referee to sell?
A. No.
209 Q. If anything was paid you, do you remember whether it was paid over to the plaintiff or its attorney?
A. No recollection whatever.
Q. Your father was present at the sale?
A. Yes.
Q. You do not recollect whether any trustee of the company was there?
A. He was a trustee.
Q. But no other officer of the trust company there?
—. ——.

Q. Did you ever at any time receive a check from William Butler Duncan payable to your order as referee, upon Duncan, Sherman & Co., upon any occasion other than this sale?

A. No.

Q. If there is any check in existence signed William Butler Duncan, payable to the order of Charles S. Fairchild, referee, and indorsed by you to the order of Sidney T. Fairchild, attorney, must it not have been given on this occasion?

A. Yes.

Objected to by Mr. Larocque and Mr. Jennings.

CHARLES S. FAIRCHILD.

CITY OF WASHINGTON, *District of Columbia*, } ss:

I, Edward J. Graham, do certify that Charles S. Fairchild, the witness, personally appeared before me on the 25th day of February, 1889, at 11 o'clock, in the forenoon, at the Treasury Department, in the city of Washington, as aforesaid, and after being sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same, and I further certify I have subscribed my name to each half sheet thereof. And I further certify that E. W. Paige, Esq., appeared on behalf of the plaintiff, and F. L. Stetson, Esq., Joseph Larocque, Esq., F. B. Jennings, Esq., and M. Hale, Esq., appeared on behalf of various defendants.

EDWARD J. GRAHAM,
Commissioner.

210 After "What is your best recollection upon the subject," (Mr. Larocque objects. Objection overruled. Exception.)

Mr. Paige then read the answer, to which Mr. Larocque objected as undertaking to give his assumption, and moves to strike out the answer as incompetent.

Mr. Paige further proceeded to read, before the ruling of the court, to the words "for the bondholders," and the objection was overruled.

Mr. Larocque specifically objects to the question "What is your best recollection upon the subject," on the ground that the witness has already stated in answer to the preceding question that he could not recollect, etc., objection being founded upon the ground of incompetency. (Objection overruled. Exception.)

Mr. Larocque objects to the answer "I have no recollection of anything whatever being said, but from whatever was said I assumed that the sale was for the benefit of all interested in the property; that was the impression I had from what was said; but what was said or by whom I can't recollect," and moves to strike out the same as incompetent. (Motion denied. Exception.)

Mr. Larocque objects to the question "And what was derived from what occurred while you and Sidney Fairchild, Mr. Duncan

and Mr. Park were together," as calling for incompetent evidence and as leading. (Overruled. Exception.)

Mr. Larocque also objects to the question "What do you understand, or mean to be understood, by the parties interested in the property" as incompetent, and also objects to the answer. Overruled. Exception.

Mr. Jennings also objects in each instance and makes the same motion and takes the same exception.

Mr. Larocque read the cross-examination.

211 Mr. Hale read the examination by himself.

Mr. LAROCQUE: In view of the repeated statement of the witness on his cross-examination as to his having absolutely no recollection of the facts or of the language, I renew my motion to strike out the evidence as to the impression he got at the sale. (Motion denied. Exception.)

Mr. Jennings also makes the same motion. Same ruling and exception.

Plaintiffs' counsel then offered in evidence the testimony of Jonathan Ryder, as follows:

JONATHAN RYDER, sworn for the plaintiff and testified:

Examined by Mr. PAIGE:

Q. Where do you reside?
A. Chatham, Columbia county.
Q. How long have you lived there?
A. I was born there.
Q. Have you been one of the railroad commissioners of that town?
A. Yes, sir.
Q. For how long?
A. Since the commissioners were first appointed; I think it was in 1867 or 1868; no, the act was passed in 1866, and ever since then I have been one of them.
Q. Did your town in 1872 and 1873 hold any bonds of the Lebanon Springs railroad?
A. Yes, sir.
Q. How many?
A. Fifty-three thousand dollars.
Q. At par?
A. Face value of the bonds.
Q. Did you ever have any conversation in regard to those bonds with William Butler Duncan?
A. Yes, sir.
Q. When was it?
A. The absolute time I only recall from the sale, the day before the sale of the road by Mr. Fairchild, at Bath; the day before that was; I had had a conversation either the first of January, or within a day or two of the first of January before that with him in regard to it.

212 Q. Give what occurred at the first conversation?
A. It was merely inquiring what the status of the bond-

holders was going to be in this sale which we had observed was going to take place by the Union Trust Company, and we were informed that Mr. Duncan was the party that was pushing it; I simply inquired of him about it and got his opinion as to what was best to do or what was to be done about it; he simply said that the bondholders would be protected in the matter; I went particularly because of the anxiety, as representing the town and the bondholders; he said there would be no difficulty about it, that the bondholders would be protected, that the sale was to be in the interest of the bondholders, and he showed me a number of the bondholders who had consented to the sale or had advised it, and showed me a sort of short agreement with the signatures of several of the large bondholders to it.

Q. Say anything about bidding himself?

A. Yes, sir; he said he expected to bid the road off at the sale; but this more particularly occurred at a future meeting.

Q. At the next meeting, when was it?

A. The day before the sale took place, in his office, in New York city; then he showed us—Mr. Wilber was with me then—another railroad commissioner; he told us we need have no worry about it and that the interest of the bondholders would be protected and he expected to buy the road and if he did it was in the interest of the bondholders and they should be all protected; we took our bonds with us to New York at that time, thinking perhaps it was better to have them there, and we were so well satisfied with the matter that we finally, instead of taking them home with us, left them with Mr. Duncan there, and took his receipt and expected the whole matter would be brought to a focus after the road was sold; he
213 held them merely as custodian; the next I saw him was in Albany the night before the sale; I had no conversation with him then; I saw him and Mr. Park and Mr. Fairchild—I was informed it was Mr. Fairchild—at McArdle's restaurant taking a lunch.

Q. The elder Mr. Fairchild?

A. No, the referee Fairchild; I understand it was him; I didn't know him; I knew Mr. Park by sight, and I was also quite well acquainted with Mr. Duncan, having had these conversations with him.

Q. When did you see Mr. Duncan next?

A. A few minutes after ten o'clock; the sale was to be at ten o'clock at a small hotel at the western terminus of the Boston and Albany railroad; I think it was the Boston hotel at Greenbush; Mr. Wilber and I went there expecting to be there present at the sale, and we were there about five minutes after ten o'clock, and there was nobody there, and they told us it was all over and they had gone; I thought best to try to see Mr. Duncan, and I looked him up; he was in Greenbush and took the train right there for New York; I saw him before he took the train, and I asked him if he had bought the road and he said he had; I asked him if all our interests were to be protected as we had talked and he said they were to be; that is all I know about it.

By Mr. HALE:

Q. You say you left those bonds with Mr. Duncan, the $53,000?

A. Yes, sir; they were left but upon no conditions except in custody in his banking-house.

Q. Were they returned to you afterwards?

A. Yes, sir; returned to Mr. Wilber; I didn't see him receive them; they were returned to us as commissioners.

Q. How long were they held by you as commissioners of the town?

A. Until we sold them; it was about the time that Van
214 Valkenburgh was appointed a receiver; Mr. Crane, of New York, bought those bonds of us.

Q. Edward Crane?

A. I think it was Edward; it was Crane, anyway.

Q. That was after Sackett's suit had been begun that you sold them to Crane?

A. I couldn't tell you about that suit, but this was before the receiver was appointed; yes, it was after that; it was all disposed of.

Q. You know about the Sackett suit?

A. I don't know whether I did or not, any further than I knew Mr. Van Valkenburgh had been appointed receiver; I never knew the merits or anything about that suit.

Q. After you learned that Van Valkenburgh had been appointed receiver, you sold the bonds to Mr. Crane?

A. Yes, sir; after we got the act of the legislature authorizing the issuing of the bonds amended so we could sell them.

Q. Do you remember what year that law was passed?

A. It was the very last of the session of the year that Mr. Van Valkenburgh was appointed receiver; I couldn't tell you the year.

Q. He was appointed receiver in 1880?

A. I remember it more particularly on account of talking with Mr. Van Valkenburgh about it; somewheres about that time.

Q. Was not that law passed in 1881 or 1882?

A. I couldn't tell you; we sold the bonds very immediately after the law was passed, you can be sure; we procured the passage of the act; we went up to Albany and got the act procured; Mr. Wilber and myself did it; no one had anything to do with the passage of the act but us.

Q. Wasn't Mr. Gay concerned in it?

A. No, sir; Mr. Gay was commissioner for the town of New Lebanon; he sold before we did.

Q. You did not, any of you, sell until after the passage of the act enabling towns to sell?

215 A. We did not; I don't know what others did.

Q. Those you sold to Edward Crane?

A. Yes, sir; I think it was Edward; it was Crane, anyway.

Q. The town of Chatham continued to be the owner and holder of those bonds until the sale to Crane?

A. Yes, sir.

(The COURT:)

Q. That enabling act was to enable you to sell them at less than par?

A. It was to enable us to sell them; the original act authorized us to to sell them but not at less than par, but the act was amended leaving out that and authorizing us to sell.

Cross-examination by Mr. LAROCQUE:

Q. I want you to try and get your nerves under control a little and think before you answer the questions, because I don't want you to answer inadvertently; you say, if I understand your examination-in-chief, that you went to New York on two occasions after the first of January, 1873?

A. I didn't say so; I said about the first of January the first time.

Q. The first occasion was about the first of January, 1873?

—. I didn't say that; I didn't say anything about 1873.

Q. State to me when your first visit to Mr. Duncan as to which you have testified on your examination-in-chief was made?

A. I told you it was on the first of January or about the first of January that that sale took place; I don't know that it was 1873, but I think it was; that was the time; it was about that time.

Q. It was about the first of January of the year in which the sale took place?

A. Yes, sir.

Q. You think 1873?

A. Yes, sir.

Q. I quote you correctly now, do I?

A. Yes, sir; I think so.

Q. Who went to New York with you on that occasion?

A. Samuel Wilber.

216 Q. Is he present in court?

A. Yes, sir; no, I don't know that he did on that occasion, he might not have gone on that occasion; on the second occasion he went with me; the first occasion I couldn't tell you about, I couldn't tell you whether he went with me or not.

Q. According to your present recollection, you can't say whether you went alone or in company with Mr. Wilber?

A. I couldn't tell you as to the first time.

Q. Where did you find Mr. Duncan upon that occasion?

A. I think in his office.

Q. Don't you recollect where you found him?

A. I think in his office.

Q. Are you not able to say certainly where you saw him?

A. I think it was in his office.

Q. Are you not able to say certainly?

A. I shan't answer you any other way; I can't answer any other way.

Q. Are you not able to say certainly where you saw Mr. Duncan upon that occasion?

A. I am very confident it was in his office.

Q. State whether you are positive or not.

A. I will not say that I am positive that it was not, but I a very confident.

Q. Then you are not able to say positively that it was at his offi you saw him upon that occasion?

A. I am satisfied it was there.

Q. Are you able now to say positively whether or not it was his office you saw him upon that occasion?

A. No, sir; I will not say positively, but I think it was.

(Mr. Larocque moved that "he thinks it was" be stricken ou Granted, as not responsive.)

Q. Who else did you see in company with Mr. Duncan upo that occasion.

A. I don't know as any one.

Q. Was he alone in his office when you had your conversatio with him?

217 —. I didn't tell you it was in his office; you insisted upo my not saying so, so that I will not tell you it was in h office.

Q. Was he alone in the place where you had the conversatio with him?

A. I couldn't tell you.

Q. Can you recollect whether or not any other person was pre ent at the time of this conversation?

A. No, sir; I cannot.

Q. At what hour of the day did it take place?

A. I couldn't tell you.

Q. Was it in the morning or evening?

A. It was undoubtedly in business hours; I couldn't tell you ce tainly; I didn't visit his house.

Q. Whether it was morning or afternoon?

A. I couldn't tell you; I know it was not in the evening aft dark, I will go as far as that, or before daylight.

Q. But further than that you can't state?

A. No, sir; I will not say positively about it.

Q. Where did you sleep the night before?

A. At the Astor house, I presume; I stop there.

Q. Do you know where you slept the night before?

A. No, I couldn't tell you; I might have gone down on the tra that day.

Q. You can't say positively whether you went to the city the d before or on that day?

A. No, sir.

Q. Or whether you went alone or in company?

A. No, sir.

Q. Did you have any bonds with you upon that occasion?

A. No, sir.

Q. Tell me as near as you can recollect what was the first thi you now recollect having said to Mr. Duncan upon that occasio

A. I tell you I can't use the words.
Q. According to your best recollection?
A. It was inquiring what this thing was going to amount to.
Q. What thing?
A. This sale.
Q. What did you say?
A. That is the substance of the conversation.
218 Q. You opened your conversation by saying "What is this thing going to amount to"?
A. I opened it as anybody would inquiring about such a subject; I couldn't tell you the words I used; it is a good while ago.
Q. Can you tell what words he used in answer to you?
A. Nothing; only the purport of it I have given you.
Q. Do you think you recollect what he said better than what you said?
A. I think I recollect the purport of his conversation entirely; what his conversation conveyed to me I recollect.
Q. I want you to say as near as you can recollect what it was he said to you in answer to your first interrogatory to him upon this subject.
A. I couldn't tell you the very words he used.
Q. How long did that conversation last?
A. That I couldn't tell you.
Q. Was there any arrangement about a further interview between you and him in that conversation?
A. I don't think there was any positive arrangement; I think such a thing was suggested or intimated; I couldn't tell you that.
Q. Now what is your best recollection at this time as to whether or not, on this occasion, anybody was with you when you visited Mr. Duncan?
A. I couldn't tell you; I have no recollection about it now; I simply know I saw him and talked with him.
Q. Do you think now that Mr. Wilber was present?
A. I don't think he was.
Q. You were examined as a witness in this Sackett case?
A. I couldn't tell you what case; I have been here once before.
Q. You don't recollect being examined as a witness?
A. I say I have been here as a witness once before, but I don't know what case it was in.
Q. If you testified in 1884 that Mr. Wilber went with you to New York on the occasion of this visit about the first of Jan-
219 uary, and called with you on Mr. Duncan, was it true?
A. It would have been to the best of my recollection; if I said so, then I think it was so.
Q. What is your present recollection?
A. I don't think he was with me at that time, as I have told you. I presume it was true if I stated it at that time, because a good many years have elapsed since then.
Q. But you are unable to tell us anything Mr. Duncan said to you upon that occasion, if I understand you?
A. Am unable to use the words he said.

Q. When was the next interview you had with him?
A. The day before the sale, as I have told you.
Q. When was this interview; where was it?
A. In Mr. Duncan's office, in his back office in his banking-house, or whatever it was.
Q. Corner of Pine and Nassau?
A. It was near Pine on the west side of Nassau.
Q. Was anybody else present upon that occasion besides yourself?
A. Yes, sir.
Q. Who?
A. Mr. Wilber.
Q. You have said that upon that occasion you took some bonds with you?
A. Yes, Mr. Wilber and I took the bonds that belonged to the town.
Q. And you said that you got a receipt for them?
A. Yes, sir.
Q. Where is that receipt?
A. It was given up when we received the bonds.
Q. Do you know anything about it?
A. Mr. Wilber received the bonds back I have understood.
Q. Whatever conversation took place between you and Mr. Duncan upon the second occasion was in the presence of Mr. Wilber?
A. Yes, sir.
Q. Tell me, if you are able, what you said to Mr. Duncan, and what he said to you upon that second occasion?
A. I should not be able to use the words that either of us said; I only give you the purport of them; Mr. Wilber and I went there to ascertain what was to be done, and what the prospect was for protecting the bonds of the town; Mr. Duncan said they should be protected if he bought the property; that he expected to buy it, and if he bought it they should be protected.
Q. If there was anything else you recollect that Mr. Duncan said upon that occasion, I want you to state it?
A. A good many things were said upon that occasion.
Q. State everything that he said to you upon that occasion in regard to those bonds?
A. I don't know that I can; I know one thing, he handed me a little cotton plant that he had brought from the South——
Q. (Int'g.) I ask you for what he said in regard to those bonds of the Lebanon Springs railroad?
A. I thought you wanted everything he said to me upon that occasion.
Q. I expressly limited my question to what he said upon the subject of these bonds, and I ask you now if there is anything else he said to you upon that occasion about the Lebanon Springs railroad bonds?
A. A good deal was said, Mr. Larocque, but the substance of——
Q. (Int'g.) What he said I asked for?
A. He said the bonds should be protected.

Q. What else did he say?

A. I can't tell you; that is what we wanted to find out; that is what I went there for; about all I can remember about it is that he gave us that assurance in so many words and we relied upon it.

(Mr. Larocque moves to strike out the last part of the answer, which was granted.)

Q. Is there anything else that you can now recollect that Mr. Duncan upon that occasion said to you upon the subject of these bonds than that they should be protected, if he bought?

A. Nothing that I know of but a good deal of conversation
221 leading to that conclusion or that promise; we talked about that, but I can't tell you the words; the conversation was that our bonds should be protected.

Q. I understand you to have said that you saw Mr. Duncan on the day of the sale.

A. The night before the sale.

Q. Did you have any conversation with him then?

A. No, sir; not any at all.

Q. You saw him again on the morning of the sale?

A. After the sale had taken place, immediately after the sale had taken place.

Q. Did you have any conversation with him?

A. Yes, sir.

Q. Who was present?

A. I don't think any one was; I talked with him just as he was stepping on the cars in Greenbush; I looked for him and found him there; we went to the place where the sale was advertised and then I looked for him and found him then getting ready to go off on the train coming over from Albany; I asked him if he bought the property; he said he did; I asked him if everything would be carried out as agreed, and he said it would; he said he had bought it for the protection of the bondholders.

Q. He made that statement?

A. He made it as emphatic as that.

Q. Did he say anything else?

A. Not much of anything else because he soon got aboard of the cars and went off.

Q. Did you ever at any other time than on the three occasions you have now testified to have any conversation with Mr. Duncan on the subject of these bonds or the sale of them?

A. No, sir.

Also the testimony of Samuel Wilber, as follows:

The same objections were made as appear in said printed case, and same disposition made thereof and exceptions taken.

Samuel Wilber, sworn for the plaintiff and testified:

222 Examined by Mr. Paige:

Q. Where do you reside?

A. Chatham, Columbia county.

Q. How long have you resided there?

A. Oh, over sixty years.

Q. Have you been one of the railroad commissioners of the town?

A. Yes, sir.

Q. How long have you been?

A. We were all appointed at one time; it was in 1867 I think.

Q. You have so continued ever since?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. William Butler Duncan in regard to the bonds issued by the Lebanon Springs railroad?

A. Yes, sir.

Q. When and where?

A. At the time that has been spoken of, the day previous to the sale; I think it was in 1874.

Q. The day previous to the sale of the railroad?

A. Yes, sir; January, 1874, I think.

Q. Where did that conversation take place, and what was said?

A. It was in Mr. Duncan's office in Pine street, New York, we called there.

(Mr. LAROCQUE:)

Q. Who do you mean by "we"?

A. Mr. Ryder and myself were present; I had met Mr. Duncan before, I said, "We have come to look after the interests of our town in connection with this bonded indebtedness;" "Yes," he said; he was very cheerful; he said, "I understand it all, I think I understand what you want;" well, we said we understood there was some contract that had been made in relation to it, that he was taking signatures from the owners of bonds pledging them to a certain course of action, that is taking power of attorney, or something of that kind I should judge; he said yes, that was the case, and said, "Walk into my back office and I will show you what it is;" he opened a large book there containing the contract
223 and the signatures attached to it, which we were allowed to look over; he said *he* could sign it if we chose or not; after reading it I told him I thought that we wouldn't sign it, that I didn't think we would be allowed to sign it under the circumstances, as we were not allowed to part with them (at a less rate than par at any rate) at that time; he said it would make no difference whether we signed it or not, that he had found it difficult to find all of the bondholders and he had given up attempting to get an expression from all of them and it would make no difference; he would take the same interest in our bonds, whether we signed it or not; we asked him what that interest would be; he said it was as good as the interest of any other party; he would take the same care of our bonds that he took of any other bonds, and we could leave them there or otherwise; we left our bonds with him, subject to our own control, however; he kept them a number of years; we left them there some three years, I think.

Q. Did he say anything about intending to bid on the road himself, and if so, what?

A. He said he intended to be the purchaser of the road if he could.

Q. For whom, if anybody, in whose interest did he intend to purchase the road; what did he say?

A. He expected to attend the sale on the morrow and might be a purchaser of the road.

Q. In whose behalf; what did he say upon that subject?

A. I couldn't put it in the same language that Mr. Ryder did.

Q. What did he say?

A. He said he might be a purchaser of the road, and he would take as good care of the interests of the town of Chatham as he took of any other interests.

Q. Did he say he was going to buy for the bondholders?

A. I didn't so understand him.

Q. What else did he say, if anything?

A. Well, that seemed to cover the ground—that he would take care of our interests as well as he took care of any interests.

224 Q. When did you next see him?

A. We came up the river that same night and met him at a restaurant in Albany; I hadn't any conversation with him after that; I spoke with him at the restaurant.

Q. When did you next see him?

A. Well, sir, I don't know that I saw him after that for a year.

Q. Did you go over to the sale?

A. We attempted to; we were a little late.

Q. Did you see him then?

A. I saw him passing down to the cars and I pointed him out to Mr. Ryder and he overtook him and had a talk with him; I didn't see him to speak to him.

Q. Did you see Mr. Park?

A. Yes, just after the sale.

Q. In East Albany?

A. Yes, sir.

Q. Mr. Duncan in New York said what in regard to what he would do for the bondholders—state what he said?

A. He said he intended to take care of the bondholders and he would take as good care of the Chatham bonds as he took of any.

By Mr. HALE:

Q. What had Mr. Duncan had to do with this Lebanon Springs railroad, if anything, before you went to New York to see him?

A. Mr. Duncan was running the road, and I think had charge of it as manager or something of that kind.

Q. Was he running it for himself or on behalf of the New York, Boston and Montreal railroad; how did you understand he was running the road, in what capacity?

A. In the interest of the organization.

Q. By the "organization" do you mean the New York, Boston and Montreal Railroad Company?

A. I think that hadn't been organized then.
Q. He had been running the road?
A. He had been running the Lebanon Springs railroad, and I had had two or three stations built for him; he had em-
225 ployed me to superintend it, and so I had become acquainted with him in that way.
Q. You had built stations on the road for him?
A. Yes, two of them.
Q. You were acquainted with him some before you had that interview?
A. Yes, sir.
Q. It was in consequence of his connection with the road and your acquaintance with him received from those relations that you went to New York to see him?
A. Yes, sir, and understanding before we went that there was to be a sale and that this arrangement was being made among the parties holding bonds and Mr. Duncan.
Q. What "arrangement"?
A. Putting stock into the hands of Mr. Duncan and under his control.
Q. It was in consequence of what you had understood in reference to such an arrangement that you went to New York?
A. Yes, that is what led us there.
Q. When you got there with Mr. Ryder did you inform Mr. Duncan anything in regard to what you had understood?
A. Certainly; that is what I said; I said we came there in the interest of our town to take care of those bonds.
Q. As bondholders?
A. Yes, sir.
Q. You stated that to Mr. Duncan at the beginning of the conversation?
A. Yes, sir.
Q. That you were there in the interest of your town which held these bonds?
A. Yes, sir.
Q. You at that time were one of the commissioners?
A. I was.
Q. And was there any other beside Mr. Ryder and yourself?
A. There were three; the third one was Ezra Hawley.
Q. Before you went to New York to see Mr. Duncan had you seen the notices of sale?
A. Yes, sir.
Q. You saw that the sale was advertised to take place on a certain day?
A. We did.
226 Q. It was with reference to that sale that you went to see Mr. Duncan?
A. Yes, sir.
Q. And knowing that it was to take place on the following day?
A. Yes, sir.

Q. Did you make any inquiry of Mr. Duncan in that interview as to what the effect of the sale would be upon the title to the road?
A. Not direct.
Q. Only as you have stated?
A. Yes, sir.
Q. You say you and Mr. Ryder and Mr. Hawley were the three commissioners of the town of Chatham?
A. Yes, sir.
Q. What part of Chatham did you reside?
A. Old Chatham.
Q. How far is that from Chatham Four Corners, where Judge McClellan lives?
A. Six miles.
Q. Do you know Marvin Sackett?
A. Yes, sir.
Q. Where did he live?
A. New Lebanon.
Q. You know Judge McClellan, his counsel?
A. Yes, very well.
Q. McClellan and Brown's office was at Chatham Four Corners?
A. Formerly Chatham Four Corners; it is now Chatham.
Q. You heard about the Sackett suit?
A. Yes, I heard something of it.
Q. You heard of it at the time?
A. Yes, sir.
Q. You knew of the appointment of Mr. Van Valkenburgh as receiver of the road?
A. Yes, sir.
Q. Do you recollect that Mr. Van Valkenburgh gave you notice that he had been appointed receiver, or how did you learn it?
A. Well, I don't know that I had any formal notice of it; I knew him so well I couldn't very well help knowing it.
Q. You saw him frequently?
A. Yes, the road passes right by my door.
Q. You knew he took charge of the road as receiver?
A. Yes, sir.
Q. You saw that improvements were made upon the road, and money expended upon it?
227 A. Yes, sir; he has made purchases of me as receiver.
Q. Money was expended upon the road?
A. Yes, sir.
Q. Labor and materials put upon the road by Mr. Van Valkenburgh as receiver?
A. Yes, sir.
Q. Do you recollect selling the bonds to Mr. Crane?
A. Yes, I was present.
Q. Do you recollect the date of that transaction?
A. Not precisely; I think it was about 1882.
Q. It was after the passage of the enabling act, enabling the town to sell their bonds at less than par?
A. Yes, sir.

Q. You, with others, were instrumental in procuring the passage of that act?

A. Yes, somewhat.

Q. The town of Chatham held these bonds until the sale to Crane?

A. Yes, all of them, up to that time.

Q. You have said that you left those bonds with Mr. Duncan in New York?

A. Yes, sir.

Q. Were they afterwards sent back to you?

A. I sent for them.

Q. Had Mr. Duncan given you a receipt for the bonds?

A. Yes, sir.

Q. How long after that did you send for them?

A. I think it was about two years; it must have been two years, I think, before I got them.

Q. How did you get them?

A. I was in New York and called for them, but Mr. Duncan was away; he had gone South, I think, so I left the receipt with a friend in New York to present to him, and he sent me the bonds.

Q. The friend with whom you left the receipt afterwards sent you the bonds?

A. Yes, sir.

Q. As I understand you there was no transfer of the bonds to Mr. Duncan?

A. Oh, not at all; they were simply left with him.

Q. This paper that you saw that was signed by the bondholders; do you remember what signatures were upon it?

A. I recollect some of them.

228 Q. Mention some of them.

(Objected to that the paper is the best evidence, whereupon plaintiff cal-s upon defendant- to produce the paper, and defendants' counsel states it is not in Troy.)

The COURT: He may state what names he saw upon the paper.

(Mr. Larocque objects as before and as immaterial, and as does Mr. Jennings also. Objection overruled. Exception.)

A. I think Samuel J. Tilden's name was to it. Trenor W. Park, Horace F. Clark, Augustus Schell and, I think, Commodore Vanderbilt, but I will not be sure about that.

Q. Cornelius Vanderbilt?

A. Yes, sir; and there were others; I don't recollect them now; Mr. Selover's name, I think, was to the paper.

Q. Do you remember Oliver Charlick's name to it?

(Objected to as leading and overruled.)

A. I think his name was to it.

Q. Did you at that time consider it as part of your duty as commissioner to ascertain whether these bonds were to be cut off by the sale that was to take place?

A. Yes, sir.

(The COURT:)

Q. These bonds which were in your possession were bonds that had been given to the railroad company in exchanges for town bonds?

A. Yes, sir.

Q. They were a part of these $2,000,000—secured by the $2,000,000 mortgage?

A. Yes, sir.

Q. Did you afterwards make any report to the town or to any officer of the town in regard to this transaction, in regard to your interview with Mr. Duncan?

A. Only verbally.

Q. Verbally, you reported to whom?

A. To the town authorities who sent us, to the town board.

Cross-examination by Mr. LAROCQUE:

Q. Did you make any record or memorandum of this conversation at the time it took place which you had with Mr. Duncan the day before the sale?

A. No, sir.

229 Q. What you have stated here on your examination-in-chief you have stated as a mere matter of recollection?

A. Entirely.

Q. If I understand you, you say that there was some paper, book or something that was shown to you that had some signatures to it?

A. Yes, sir.

Q. And which you read?

A. Yes, sir.

Q. I don't want you to state the contents of that paper, but I want to ask you this: I think you said on your examination-in-chief that after reading you declined to become parties to it; is that so?

A. Yes, sir.

Q. And if I recollect rightly what you said you did it for one reason, because you didn't think you had any authority to do it?

A. Yes; that's it.

Q. If I understand your testimony aright, after you had declined, Mr. Duncan told you that it was of no importance, as the whole thing had fallen through; is that right?

A. Well, I don't know that he said fallen through, but he had dropped the matter.

Q. That this matter, whatever it was, had been dropped?

A. Yes, sir.

Q. So that it was of no importance whether you signed it or not?

A. Yes, sir.

Q. Didn't you want Mr. Duncan and didn't you ask him to undertake to take your bonds and represent them in case of a sale?

A. No, sir.

Q. You didn't ask him to?

A. No, sir.

Q. Didn't he decline to take your bonds, or to represent them, and say to you that he wouldn't have anything to do with them, but if it was a matter of convenience for you to put them in a place of safe keeping you might put them in the vault; wasn't that what took place in regard to them?

A. That was about all in regard to leaving the bonds there.

Q. The only terms upon which he would have anything
230 to do with them was that you might have a place of deposit for their safe keeping; that is what it was, isn't it?

A. That is all there was of it.

Q. Didn't he tell you in the course of the conversation that had he understood that the road was to be sold, and that if he could buy it he might buy it, but that anybody else could go and buy it if they saw fit?

A. He said he expected to be present and probably should buy the road.

Q. Didn't he say if anybody else wanted to buy it they could have the same privilege?

A. I don't know that he did; I presume that any one else had the same privilege.

Q. Didn't he, in express terms, decline to act for anybody else in buying if he should buy?

A. In what way?

Q. Didn't he decline to act as the representative of any other person in purchasing the road if he should purchase it?

A. I don't know that he declined; we didn't ask him to buy it.

Q. Didn't he decline to act in your behalf in any purchase of the road?

A. We didn't ask him to.

Q. Didn't he say he could not and would not?

A. No, sir; he simply said he would take care of our interests, the interests of the town of Chatham, as well as he took care of any other interests, his own.

Q. In that connection didn't he state to you explicitly that he would decline to act as the representative of anybody in making any purchase he might make?

A. We didn't offer to sell him our bonds.

Q. Didn't he in the same connection in which he said to you that he would do as well by you as he did with any other bondholders if he bought, expressly declare to you that he would not purchase as the representative of any of them?

A. No, sir; no such language used that I recollect.

Q. Didn't he use words to that effect?

A. Nothing was said about buying and selling bonds.

231 Q. I speak of the buying of the road at the sale which was advertised to take place on the following day, and didn't he say he would not act as the representative of anybody else in making the purchase if he purchased?

A. He said he would act for the interest as a whole; we didn't ask him for any better terms than others had.

Q. Didn't he say he wouldn't act as the representative of any-

body, that anybody that chose could go and buy, and if he bought he wouldn't act for anybody, but if he did he would do as well for you as he did for anybody else?

(Objected to as having been asked and answered.)

The COURT: The witness does not directly respond to the inquiry as put.

Q. You have testified to a conversation, and you have said that a book or paper was shown you which had certain signatures to it, and that you declined to sign, and that you did not think you had a right to?

A. Yes, sir.

Q. You declined to sign it and he then advised you that it made no difference because the plan had fallen through; didn't you say that the plan had fallen through?

A. Had abandoned it; he d[illegible]n't say it had fallen through.

Q. Then the question cam[illegible]bout what was to be done at the sale and you say he told you [illegible]would do as well for you as he did for any of the other bondhold[illegible]s?

A. Yes, sir.

Q. I ask you if, in connection with that very statement, he didn't say to you that if he purchased he would decline to act for anybody but himself?

A. No——

Q. (Interrupting). Or that anybody else had the same right to buy?

A. There were no words of that kind used to my recollection.

(It is understood that exceptions follow all rulings.)

232 Plaintiffs' counsel then read in evidence from said printed case a mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company of New York, of which the following is a copy:

This indenture, made at the city of New York the first day of July, A. D. one thousand eight hundred and sixty-seven, between the Lebanon Springs Railroad Company, of the first part, and the Union Trust Company of New York, of the second part.

Whereas, the party of the first part finds it necessary to borrow a sum of money for the purpose of constructing its railroad, purchasing rolling stock and putting their road in operation, and also for the purpose of discharging existing liabilities, now this indenture witnesseth:

That the said party of the first part has resolved for the purposes aforesaid to issue its bonds to such amount as may be necessary, not exceeding the sum of two millions of dollars, in sums of one thousand and one hundred dollars each, bearing date the first day of July, one thousand eight hundred and sixty-seven, and payable to the bearers thereof on the first day of July, one thousand eight hundred and ninety-seven, with interest from the first day of July, one thousand eight hundred and sixty-seven, at the rate of seven per cent. per annum, payable semi-annually on the first day

of every January and July ensuing the date hereof, until the principal shall have been paid upon the presentation of the coupons to be annexed to such bonds respectively at the office of the Union Trust Company of New York in the city of New York, which bonds are to be countersigned by the party of the second part, and that the said bonds are to be issued from time to time as the exigencies of the
233 party of the first part may require. And for the purpose of securing the payment of the said bonds so to be issued to the amount of not exceeding two millions of dollars, and of the coupons attached thereto, or such of said bonds and coupons as shall from time to time be outstanding and unpaid, and the performance of the covenants hereinafter contained on the part of the said party of the first part, and in consideration of the sum of one dollar to the said party of the first part paid by the said party of the second part at the time of the execution and delivery of these presents, the said party of the first part hath granted, bargained, sold, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, release, convey and confirm unto the said party of the second part and its successors, as trustees for whomsoever may from time to time be the holders of said bonds hereby secured, all the right, title and interest of the said party of the first part of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part from the Chatham Four Corners in the county of Columbia to the east line of the State of New York in the town of Hoosick, in the county of Rensselaer, and all lands hereafter to be acquired for the purpose of forming said track or roadway. Also the railroad of the said party of the first part now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the party of the first part connected with said railway or relating thereto, including its rights and franchises as a corporation. And also all the rolling stock, locomotives, tenders, snow-plows and scrapers, all the passenger cars, baggage, mail and express
234 cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars and in the running of the cars now owned or hereafter to be acquired by the said party of the first part, all of which chattels are declared to be fixtures and appurtenances to said railroad and are to be used and sold therewith and not separated therefrom and to be taken as a part thereof. And also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid to the village of Bennington in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining or which

may at any time belong or appertain to the same as well in law as in equity. To have and to hold all and singular the hereby-granted premises with appurtenances and the goods and chattels hereinbefore bargained and sold unto the said party of the second part and its successors forever, provided always, and these presents are upon the express condition, that if the party of the first part shall well and truly pay to the holders of the bonds to be issued as hereinbefore stated or of such of the bonds as shall from time to time be outstanding and unpaid and every of them the principal and interest moneys to grow due on said bonds respectively at the times and in the manner mentioned in the said bonds and in the coupons thereto annexed, according to the true intent and meaning of the same. And provided, also, if the said party of the first part shall keep and perform all the covenants on its part herein contained, and shall, until the full payment of the princi-
235 pal and interest of the bonds hereby secured and whenever required by the said trustees keep paid off and discharged all taxes and assessments which may at any time be imposed upon the real or personal estate hereby granted, bargained and sold or intended so to be or upon any portion of either and all general or specific liens upon any of the property, real or personal of the said party of the first part, the payment whereof may be material, necessary or essential to the protection of the security hereby created. And provided, also, that if the said party of the first part shall at all times, until the full payment of the principal and interest of the bonds hereby secured, keep the said railroad and rolling stock in good and sufficient repair then and from thenceforth these presents and the estate hereby granted shall cease, determine and be null and void. But in case default should be made in the payment of the principal or interest of said bonds hereby secured, or such of them as may from time to time be outstanding, or any of them, or any part of either as said principal or interest shall fall due according to the tenor of said bonds, or in case the party of the first part shall fail to keep paid off and discharged the taxes and assessments which may be imposed upon the mortgaged premises or property, or any part thereof, as hereinbefore provided or any general or specific liens on said premises or property the payment whereof may be material, necessary or essential to the protection of the security hereby created, or in case the party of the first part shall fail to keep the said railroad in good and sufficient repair as hereinbefore provided or shall make default in the performance of any of the covenants on its part herein contained, then and in either of the cases above mentioned the conveyance herein contained shall be in full force and virtue, and if such default shall exist after January first, one thou-
236 sand eight hundred and sixty-nine, it shall be lawful for the party of the second part or its successors, and the party of the first part doth hereby fully authorize and empower it, with the aid and assistance of any person or persons, to enter into and upon and to take possession of the said railroads and all and singular the property, both real and personal, hereby mortgaged and every or any part thereof, and to hold the same as mortgagees in possession

for the benefit of the holders of said bonds hereby secured, and to retain and keep possession of said property, real and personal, use and operate the same and to make from time to time all necessary or proper repairs and replacements and to receive the earnings, rents, issues and profits thereof until a sale thereof shall be made pursuant to law, rendering an account thereof to the parties of the first part, and after paying all current expenses and the expenses of necessary repairs and replacements and all other proper costs, charges and expenses, taxes, assessments and making all other payments, necessary for the protection of the security hereby created, to apply the surplus if any to the payment *pro rata* of the interest and principal of the bonds hereby secured or such of them as may be then outstanding. And in case default shall be made in the payment of the interest as it falls due upon the said bonds hereby secured or any of them after January first, one thousand eight hundred and sixty-nine, or if default shall be made in the payment of the principal thereof or of any of them when due or in making any of the payments of taxes, assessments or any of the payments herein agreed to be made by the party of the first part or in the performance of any of the covenants, provisions or conditions herein contained, the said party of the second part to these presents or its successors are hereby authorized and empowered to grant, bargain and sell the property and premises hereby mortgaged, and all the right, title, interest
237 and equity of redemption of the said party of the first part therein, at public auction, in the city of New York, pursuant to the statute in such case made and provided, and as the attorney of the party of the first part by these presents duly constituted and appointed to make, execute, seal and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds, bill or bills, by sale, conveyance or conveyances, in fee-simple for the same, and out of the moneys arising from such sale, after paying the expenses of such sale, and all moneys expended for necessary repairs or replacements or necessary expenses, to pay to the several holders of the bonds and coupons hereby secured the amount of principal and interest which may be due or unpaid to them respectively, rendering the overplus, if any, to the party of the first part, its successors and assigns, which sale so to be made shall forever be a perpetual bar both in law and in equity against the said party of the first part, its successors and assigns, and all other persons claiming or to claim the premises so sold or any part thereof, by, from or under the said party of the first part, its successors or assigns, and should default be made in the performance of any of the conditions, covenants or agreements herein contained on the part of the party of the first part after January first, one thousand eight hundred and sixty-nine, and should the said trustee fail to forthwith take possession of said railroad and the mortgaged property, and operate the same as hereinbefore authorized, any holder of any of said bonds secured by this mortgage may apply in behalf of himself and the other holders of the bonds hereby secured to the supreme court on notice of the party of the first part, and to the said trustee under this mortgage or its successor by action or otherwise, as the said court may direct, for

the appointment of a receiver of the said mortgaged prem-
238 ises and property, and on such application the said supreme court may appoint such receiver with like powers as are herein conferred upon said trustee, and as appertain to receivers in such cases. And said trustee shall have the like power to apply for a receiver, and should the said trustee neglect or refuse, after January first, one thousand eight hundred and sixty-nine, to institute an action for the foreclosure of this mortgage, or to prosecute such action or the proceedings for such sale with due diligence, it shall be lawful for any holder of any of the bonds hereby secured to apply in behalf of himself and the other holders of said bonds to the said supreme court, on notice to the party of the first part, and to said trustee or its successor by action or otherwise as the said supreme court shall direct for a sale of the said mortgaged premises, and on such application it shall be lawful for the said court to order such sale according to the course of practice of said court in cases of foreclosure of mortgages. But in case of any such application or action by any bondholder for a receivership or for a sale, it shall not be lawful for any other bondholder to make a similar application or to bring a similar action while said first-mentioned application or action or proceedings therein or thereunder is or are pending. And it is further mutually agreed between said parties that should the party of the second part decline or become unable to continue to act as trustee hereunder, another trustee or trustees may be appointed in its place by the supreme court, and the said party of the first part, for itself and its successors, further covenants with the parties of the second part and its successor that the party of the first part will, on the reasonable request of the party of the second part or its successors, make and execute all further assurances, conveyances and instruments needful or proper to assure or convey unto it all the premises, property, and fixtures
239 hereby intended to be mortgaged, and all premises, property, fixtures and appurtenances which may hereafter be acquired by the party of the first part and may appertain to said railroad or to the said Vermont and New York railroad, so that said party of the second part may hold such hereafter-acquired property in the same manner as if it had belonged to the party of the first part at the time of the execution of these presents and had been herein specifically described.

In witness whereof, the said party of the first part has caused its corporate seal to be affixed to these presents the day and year first above written, and has caused these presents to be subscribed by its president and secretary pursuant to a resolution of the board of directors of the said party of the first part, adopted on twenty-third day of July, one thousand eight hundred and sixty-seven.

[L. S.] H. F. CLARK, *President.*
R. C. ROOT, *Secretary.*

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 3d day of October, A. D. 1867, before me personally came Russell C. Root, to me known, who, being by me duly sworn, did depose and say that he resided in the city and county of New York, and was the secretary of the Lebanon Springs Railroad Company, and that the seal which is hereunto affixed was the corporate seal of the said company, and that the same was affixed thereto by and under the direction and authority of the board of directors of said company, and that he signed his name thereto by the like order as secretary of said company.

W. J. VAN ARSDALE,
Notary Public, N. Y. City.

240 STATE OF NEW YORK, } ss:
City and County of New York, }

I, William C. Conner, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county of the same, being a court of record, do hereby certify that W. J. Van Arsdale, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 4th day of October, 1867.

[L. S.] WM. C. CONNER, *Clerk.*

Recorded 30th October, 1867, at 9 hrs. 45 m. a. m.
J. THOMAS DAVIS, *Clerk.*

STATE OF NEW YORK, }
Rensselaer County, Clerk's Office. }

I hereby certify that I have compared the annexed copy mortgage with the record thereof remaining in this office, and that the same is a correct transcript therefrom and of the whole of said record.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 10th day of June, 1889.

D. E. CONWAY, *Clerk.*

241 Plaintiffs' counsel also gave in evidence a consolidation agreement made between the Ben-ington and Rutland Railroad Company and the Lebanon Springs Railroad Company dated January 1, 1870, forming the Harlem Extension Railroad Company.

It was agreed that the exhibits retain the same marks as in the printed case.

Plaintiffs' counsel read in evidence from said printed case "Exhibit 12" being a mortgage from the Harlem Extension Railroad Company to the Union Trust Company of New York, dated April 1, 1870, conveying same premises.

Plaintiffs' counsel also put in evidence "Exhibit No. 13" from said printed case, being the consolidation agreement between the Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company, forming the New York, Boston and Montreal Railway Company. The following is a copy of a portion of said agreement:

SECTION THIRD. The disbursement trustees shall set apart for the payment or discharge of the Harlem Extension mortgage debt, and the Harlem Extension unsecured debt, two millions nine hundred and three thousand dollars of said consolidated first-mortgage bonds, and three millions and eighty-seven thousand dollars of said consolidated second-mortgage bonds; and they shall hold and dispose of the same as follows:

They shall sell and dispose of said consolidated first-mortgage bonds, and shall apply the proceeds thereof, together with such consolidated second-mortgage bonds, to the payment or discharge of the Harlem Extension mortgage debt; and if any balance remains after making, or providing for the making, of such payment or discharge, they shall apply it to the payment or discharge of the Harlem Extension unsecured debt.

242 Such payment or discharge of the Harlem Extension mortgage debt shall be made by paying therefor at rates which, upon an average, shall not exceed forty-five (45) per cent. of the par value of said Harlem Extension mortgage debt in cash, and the balance of such par value in such consolidated second-mortgage bonds.

Such payment or discharge of the Harlem Extension unsecured debt shall be made by paying therefor at rates which, upon an average, shall not exceed forty-five (45) per cent. of the whole of said Harlem Extension unsecured debt in cash, and the balance in such consolidated second-mortgage bonds at their par value.

At any time after retaining in their hands an amount of said proceeds of consolidated first-mortgage bonds sufficient to pay or discharge all of said Harlem Extension mortgage debt then outstanding at par, said disbursement trustees may pay over the balance of such proceeds and consolidated second-mortgage bonds to such person as may be designated by the first-mortgage trustees, upon his giving to said disbursement trustees, for the benefit of said New York, Boston and Montreal Railway Company, satisfactory security to pay, satisfy and discharge all the outstanding Harlem Extension unsecured debt.

And whereas, proceedings have been taken to foreclose the equity of redemption, under the said mortgage, executed by the Lebanon Springs Railroad Company, and by the Harlem Extension Railroad

Company, and the railroads therein mentioned have been decreed to be sold and are advertised for sale, it is agreed that in case such railroads, or any part thereof, shall be sold under any such decree, and the purchaser or purchasers thereof shall convey all and singular the railroads or parts of railroad so purchased to the said New York, Boston and Montreal Railway Company, and shall give to the disbursement trustees, for the benefit of the said New
243 York, Boston and Montreal Railway Company, an indemnity which shall be satisfactory to them against the whole of said unsecured debt of the Harlem Extension Railroad Company, then said disbursement trustees, after retaining in their hands so much of the proceeds of said two millions nine hundred and three thousand dollars of consolidated first-mortgage bonds as will pay, satisfy or discharge the said mortgage of five hundred thousand dollars of the Bennington and Rutland Railroad Company, and the interest thereon, shall pay to such purchaser or purchasers the balance of said last-mentioned amount of proceeds and of consolidated second-mortgage bonds.

Fifth. Upon trust, to sell and dispose of the following amounts respectively of said consolidated first-mortgage bonds, and to apply the proceeds thereof to the following purposes respectively, to wit:

The proceeds of one million five hundred thousand dollars thereof to the purchase of rolling stock and equipment for the railroad of said consolidated company.

The proceeds of two hundred and thirty thousand dollars thereof to the payment of the Bennington and Glastonbury Railroad, Mining and Manufacturing Company, of the amount of the cash payment due thereto by the said Harlem Extension Railroad Company, under an agreement for the lease of its railroad to said Harlem Extension Railroad Company, dated the first day of May, one thousand eight hundred and seventy-two.

The proceeds of one hundred and seventy-two thousand dollars thereof to the payment of the Clove Branch Railroad Company, of the amount of the cash payment due thereto by the said New York, Boston and Northern Railway Company, under an agreement
244 for the lease of the Clove Branch railroad to the Putnam and Dutchess Railroad Company, dated the seventeenth day of April, one thousand eight hundred and seventy-two.

The proceeds of eight hundred and ninety-seven thousand dollars thereof to the completion of the construction of the railroad formerly known as the Putnam and Dutchess railroad.

The proceeds of one million two hundred and eighty-seven thousand dollars to the completion and construction of the railroad formerly known as the Pine Plains and Albany railroad.

The proceeds of eight hundred and five thousand dollars thereof to the completion of the railroad formerly known as the New York and Boston railroad.

The proceeds of one million dollars thereof to the payment of interest which may become due upon said consolidated first-mortgage bonds.

The balance of said proceeds of said issue of consolidated first-

mortgage bonds and of said amounts of consolidated second-mortgage bonds remaining, after applying the amounts thereof above mentioned, as hereinabove provided, shall be paid by the disbursement trustees to the treasurer of the New York, Boston and Montreal Railway Company.

Also Exhibit No. 14, as follows:

245 (*Copy Docket Entries.*)

In Chancery, December Term, 1872.

STATE OF VERMONT, *Bennington County,* } *ss:*

THE UNION TRUST COMPANY OF NEW YORK *against* THE HARLEM EXTENSION RAILROAD COMPANY and The Lebanon Springs Railroad Company. } Phelps, Ly. G. W. Harman. G. W. Harman.

Bill.

Debt	$490,000 00
	31 00
	$490,031 34

Bill confessed and referred to John V. Hall, master, to take the account. Report filed December 6, 1872, and accepted and confirmed. Decree according to the prayer of the bill and report, with costs by consent.

I certify the foregoing to be a true, full and correct copy of the docket entries in above-entitled cause.

[SEAL.] EDWARD J. HALL, *Clerk.*

246 (*Copy Docket Entries.*)

In Chancery, December Term, 1872.

STATE OF VERMONT, *Bennington County,* } *ss:*

THE UNION TRUST COMPANY OF NEW YORK *against* THE HARLEM EXTENSION RAILROAD COMPANY. } Phelps, Ly. G. W. Harman.

Bill.

Debt	$1,657,500 00
Costs	31 35
	$1,657,531 35

Bill confessed and referred to John V. Hall, master, to take the account. Report filed December 6, 1872, and accepted and confirmed.

Decree according to the prayer of the bill and report, with costs by consent.

I certify the foregoing to be a true, full and correct copy of the docket entries in above-entitled cause.

[SEAL.] EDWARD J. HALL, *Clerk.*

Also Exhibits 15 and 16 as follows:

"15."

Know all men by these presents, that James C. Hull, of New York, and Charles G. Lincoln, of Bennington, Vermont, are
247 held and firmly bound unto William Butler Duncan, of New York, and Trenor W. Park, of Bennington, Vermont, in the sum of ten millions of dollars, lawful money of the United States of America, to be paid to the said William Butler Duncan and Trenor W. Park, their executors and administrators and assigns, for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated the twenty-eighth day of January, one thousand eight hundred and seventy-three.

The condition of the above obligation is such that if the above-bounden James C. Hull and Charles G. Lincoln, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above-named William B. Duncan and Trenor W. Park, their executors, administrators or assigns, the just and full sum of five millions of dollars, on or before the first day of August, eighteen hundred and seventy-three, with interest at the rate of seven per cent. per annum, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

JAMES C. HULL. [L. S.]
CHAS. G. LINCOLN. [L. S.]

Sealed and delivered in the presence of—
H. C. EMMET.

Also, the mortgage accompanying said bond:

"16."

This indenture, made the twenty-eighth day of January, in the year one thousand eight hundred and seventy-three, between James C. Hull, of New York, and Charles G. Lincoln, of Bennington, Vermont, parties of the first part, and William Butler Dun-
248 can, of New York, and Trenor W. Park, of Bennington, Vermont, parties of the second part:

Whereas, the said James C. Hull and Charles G. Lincoln are

justly indebted to the said parties of the second part in the sum of five millions of dollars, lawful money of the United States of America, secured to be paid by their certain bond or obligation bearing even date with these presents, in the penal sum of ten millions of dollars, lawful money as aforesaid, conditioned for the payment of the first-mentioned sum of five million dollars on or before the first day of August, eighteen hundred and seventy-three, with interest at the rate of seven per cent. per annum, as by the said bond or obligation and the condition thereof, and the said agreement therein contained, reference being thereunto had may more fully appear.

Now, this indenture witnesseth: That the said party of the said first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof; and also for and in consideration of the sum of one dollar to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said parties of the second part, and to their heirs, and assigns forever, all the right, title and interest of the parties of the first part in and to all and singular the several pieces or parcels, of land forming the track or roadway of the railroad from Chatham Four Corners, in the county of Columbia, to the State line of New York, in the town of Hoosick, in the county of Rensselaer, and all lands hereafter to be acquired for the purpose of forming
249 said track or roadway. Also, the railroad now built and to be built, formerly called the Lebanon Springs railroad, and afterward the Harlem Extension railroad, extending from Chatham Four Corners to the State line aforesaid, and all the rails, bridges, fences, station-houses, wood-houses, buildings and other structures, appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits, and alienable franchises of the said party of the first part connected with said railway, and relating thereto, including its rights and franchises as a corporation; and also, all the rolling stock, locomotives, tenders, snow-plows and scrapers, all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description, all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars and in the running of the cars now owned or hereafter to be acquired by the said parties of the first part, all of which chattels are declared to be fixtures and appurtenances to said railroad and are to be used and sold therewith and not separate therefrom, and to be taken as a part thereof; and also, the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part, in the town of Hoosick aforesaid to the village of Bennington,

in the State of Vermont, including all the right, title and interest of the party of the first part in and to the franchise and equipment of the said Vermont and New York railroad, belonging, or in anywise appertaining, or which may at any time belong or appertain to the same, as well in law as in equity, meaning hereby to convey to the parties of the second part, their heirs and assigns, all
250 the property conveyed to James C. Hull, one of the parties of the first part, by Charles S. Fairchild, referee, on the twenty-fifth day of January, eighteen hundred and seventy-three, reference being had to said deed for a more particular description; also, all that certain railroad, with its privileges, appurtenances, lands, premises, rights and property situated within the State of Vermont, and being all the Harlem Extension railroad, as now occupied, used and operated, that lies within the States of Vermont and New York, at Hoosick, in the county of Rensselaer, in the State of New York, through the village of Bennington to Rutland, and from North Bennington, Vermont, to the State line, in the town of Shaftsbury, Vermont, comprising the railroad formerly known as the Bennington and Rutland and Vermont and New York railroads, and connecting at said Hoosick with the railroad formerly known as the Lebanon Springs railroad, and at said Rutland with the Rutland railroad, together with all and singular the franchise and rights derived under the laws of the State of Vermont, as now held or enjoyed by any or either of the said railroad companies for owning, occupying, maintaining or operating said Harlem Extension railroad within the State of Vermont; and also all that certain railroad, with its privileges, appurtenances, premises, rights and property formerly known as the Vermont and New York railroad, extending from the State line between the States of New York and Vermont, at Hoosick, in the county of Rensselaer and State of New York, to the village of Bennington, in said county of Bennington, a distance of five miles, more or less, connecting the railroads formerly known as the Lebanon Springs railroad, in the State of New York, and the Bennington and Rutland railroad, in the State of Vermont and forming with those roads, as consolidated, the Harlem Extension railroad as now used and operated, together with all the franchises for own-
251 ing, maintaining and operating the said Vermont and New York railroad, derived under the laws of the State of Vermont by said Lebanon Springs and Harlem Extension Railroad Companies, or now held or enjoyed by either of them. Being all the property purchased by Charles G. Lincoln, one of the parties of the first part, at two sales made on the twentieth day of January, eighteen hundred and seventy-three, by Daniel McEwen, special master in chancery, in suit of The Union Trust Company of New York *v.* The Harlem Extension Railroad Company, and the suit of The Union Trust Company of New York *v.* The Harlem Extension Railroad Company and The Lebanon Springs Railroad Company, reference being had to two certain deeds executed by Daniel McEwen, special master in chancery, to Charles G. Lincoln, on the twentieth day of January, eighteen hundred and seventy-three, for

more full description. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in and to the same, and every part and parcel thereof, with the appurtenances. To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, to their own proper use, benefit and behoof forever: Provided, always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors or administrators, shall well and truly pay unto the said parties of the second part, their executors, administrators or assigns, the said sum of money
252 mentioned in the condition of the said bond or obligation. and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and the estate granted shall cease, determine and be void.

And the said James C. Hull and Charles G. Lincoln, for themselves and their heirs, executors and administrators, do covenant and agree to pay unto the said parties of the second part, their executors, administrators or assigns, the said sum of money and interest as mentioned above and expressed in the condition of the said bond.

And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said parties of the second part, their executors, administrators and assigns, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same and all benefit and equity of redemption of the said parties of the first part, their heirs, executors, administrators or assigns, therein at public auction, according to the act in such case made and provided, and as the attorney of the said parties of the first part for that purpose by these presents duly authorized, constituted and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee-simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, rendering the surplus of the purchase-money (if any there shall be) unto the said James C. Hull and Charles G. Lincoln, parties of the first part, their heirs, executors, administrators or assigns,
253 which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their heirs and assigns, and against all other persons claiming or to claim the premises or any part thereof by, from or under them, or either of them.

In witness whereof, the parties of the first part to these presents have hereunto set their hands and seal the day and year first above written.

JAMES C. HULL. [L. S.]
MELISSA A. HULL. [L. S.]
CHAS. G. LINCOLN. [L. S.]

Sealed and delivered in the presence of—
WILLIAM G. LENT,
As to James C. Hull and Melissa A. Hull.
JOHN BISSELL,
As to C. G. Lincoln.

Acknowledged by Charles G. Lincoln and James C. Hull and wife, and recorded in Rensselaer county clerk's office, February 14, 1873, and in Bennington county, Vermont, clerk's office, May 1, 1873.

Also, Exhibit No. 17, being a deed from James C. Hull and wife to the New York, Boston and Montreal Railway Company, dated January 30, 1873, consideration expressed five dollars, of the premises described in the foregoing mortgage Exhibit No. 16, subject to the five-million mortgage above set forth, recorded in Columbia county clerk's office February 14, 1873.

Also, Exhibit No. 18, being a mortgage dated February 1, 1873, given by the New York, Boston and Montreal Railway Company to Jesse Seligman, John Crosby Brown and William Watts Sherman, to secure bonds of said railway company to the amount at par of $12,250,000, conveying the main line of the mortgagor, including the railroads of the Lebanon Springs and Bennington and Rutland Railroad Companies, and other things; recorded in Rensselaer and Columbia counties in 1873.

254 Also, Exhibit No. 19, being a mortgage of the New York, Boston and Montreal Railway Company to the New York Loan and Indemnity Company to secure bonds to the amount of $12,750,000 par value, conveying the same property as the last above-mentioned mortgage, and recorded in Rensselaer and Columbia counties in the year 1873.

Also, Exhibit No. 20, being an agreement dated February 11, 1873, between the New York, Boston and Montreal Railway Company and Jesse Seligman, William Watts Sherman and John Crosby Brown.

Also, Exhibit No. 21, as follows:

Memorandum of agreement this day made between the New York, Boston and Montreal Railway Company, party of the first part, hereinafter called the company, and Trenor W. Park and William Butler Duncan, parties of the second part, hereinafter called the mortgagees, witnesseth:

Whereas, the company was heretofore and prior to the twenty-first day of January, eighteen hundred and seventy-three, the owner of a certain railroad and other property acquired by it by virtue of a certain act of consolidation made between the New York, Boston

and Northern Railway Company and the Harlem Extension Railroad Company, whereby the company was created, duly filed in the office of the secretary of state of the State of New York on the twenty-first day of January, eighteen hundred and seventy-three.

And, whereas, a portion of the railroad owned by the company at the date aforesaid, to wit, that portion of the road between the village of Bennington and the village of Rutland, in the State of Vermont, was on the fifteenth day of August, eighteen hundred and sixty-seven, mortgaged to the Union Trust Company of New
255 York, to secure the payment of bonds of the Bennington and Rutland Railroad Company, to the amount of five hundred thousand dollars, which said bonds are now outstanding.

And, whereas, the entire railroad, formerly of the Harlem Extension Railroad Company, owned as aforesaid by the company, and including the portion of road above described, was heretofore mortgaged for various sums, upon the payment of which defaults have been made and judicial sales had under said mortgages in the States of Vermont and New York since the beginning of the title of the company as aforesaid, at which sales the whole of said railroad was purchased by James C. Hull and Charles G. Lincoln, who thereupon, for consideration, on the thirtieth day of January, eighteen hundred and seventy-three, conveyed and released to the company the said road by good fee-simple title, subject, however, to a mortgage made by them, dated the twenty-eighth day of January, eighteen hundred and seventy-three, to secure the payment of their bonds for five millions of dollars on the first day of August, eighteen hundred and seventy-three, to the mortgagees, which bond and mortgage are now held and owned by the mortgagees.

And, whereas, both of said mortgages hereinbefore described are liens upon portions of the railroads owned by the company, and the parties hereto are desirous of arranging a method for securing the payment and discharge of both of said mortgages.

It is agreed as follows:

First. The company will issue its bonds, payable thirty years from date, to the amount of twelve millions two hundred and fifty thousand dollars, and secure the same by a first mortgage upon all the railroads of the company, including that portion above described, and will negotiate for the sale of said first-mortgage bonds for cash, and will endeavor to sell the same before the first day of August, eighteen hundred and seventy-three.

256 Second. The company will issue its bonds, payable thirty years from date, to the amount of twelve millions seven hundred and fifty thousand dollars, and secure the same by a second mortgage on the railroads of the company.

Third. The company will pay for the account of the mortgages in the manner hereinafter provided, and in full satisfaction of both the mortgages described in the preamble, the sum of five millions six hundred thousand dollars, with interest from the first day of January, eighteen hundred and seventy-three, to be paid in cash and second-mortgage bonds as follows: In cash, the proceeds of two millions nine hundred and three thousand dollars of the said first-

mortgage bonds, to be paid from time to time as said first-mortgage bonds of the company are sold, paying the said mortgagees, or for their account, in the manner hereinafter provided, 290,300-12,250,000 part of all moneys received from the sale of its said issue of bonds, and together therewith second-mortgage bonds, as aforesaid, of the par value of three millions and eighty-seven thousand dollars, to be delivered from time to time as the said cash payments are made, and in such ratio to the cash payments made from time to time that when the entire proceeds or body of first-mortgage bonds are paid out the whole of the second-mortgage bonds will, in like manner and simultaneously, be paid out; provided, however, that none of the said first-mortgage bonds be sold by or for the company so as to produce less than eighty-seven per cent. net, exclusive of interest, without the consent of the mortgagees.

Fourth. The mortgagees agree that the payments provided for in the last clause, when made, shall be in full satisfaction of both said mortgages, and that thereupon satisfaction of and dis-
257 charge of record of said mortgages shall be made and perfected in the manner hereinafter provided.

Fifth. Upon and after the payment of six hundred thousand dollars in cash to the mortgagees, or for their account, as hereinafter provided, the mortgagees will indemnify and save harmless the company from any and all claims under the mortgage to the Union Trust Company of New York, dated August 15, eighteen hundred and sixty-seven, first above described, or the bonds secured thereby, and upon the like payment to the mortgagees, or for their account, of the sum of fifteen hundred thousand dollars in cash, they, the mortgagees, will procure the said mortgage to be discharged of record, or will place in the hands of the trustees hereinafter appointed an amount in cash sufficient to discharge the same in full, with interest, which sum the trustees shall and are hereby authorized and directed to use for that purpose.

Sixth. The mortgagees agree that in case the company shall be unable to sell all their first-mortgage bonds so as to pay as above provided the proceeds of the bonds above stipulated for on or before the first day of August, eighteen hundred and seventy-three, as provided in the third clause, then, if the company shall pay to the mortgagees, or to the trustees for them, the interest due them on the first day of August, eighteen hundred and seventy-three, and shall thereafter, each six months, pay in like manner the interest on the sum then due them, the time for payment of the same shall be, and be deemed, extended for the term of eighteen months from said first day of August, eighteen hundred and seventy-three.

Seventh. It is mutually agreed between the parties, that at any time after the first day of August, eighteen hundred and
258 seventy-three, the mortgagees may have the option to take any proportion or all of the said two millions nine hundred and three thousand dollars first-mortgage bonds of the company then remaining unsold, with the accrued interest on same, in lieu of the cash proceeds of the same.

Eighth. Nothing in this agreement shall be construed as making

the mortgagees in any way responsible for the mortgage made August fifteen, eighteen hundred and sixty-seven, by the Bennington and Rutland Railroad Company, or the payment of the same, until they shall have received at least six hundred thousand dollars in cash from the company.

Ninth. In view of the fact that the company contemplate naming William Watts Sherman, Jesse Seligman and John Crosby Brown as trustees to receive said first-mortgage bonds and disburse the money derived from the sale of the same, and to receive and disburse a portion or all of the said second-mortgage bonds, and in order more fully to carry into execution the object and intent of this agreement, and to secure the due execution thereof in all contingencies, the mortgagees do hereby covenant and agree to deliver at the signing hereof to the said Sherman, Seligman and Brown, herein named as trustees, the said indenture of mortgage above described, made by James C. Hull and wife, and Charles G. Lincoln, to them, bearing date the twenty-eighth day of January, eighteen hundred and seventy-three, together with the bond secured thereby. In trust, first—to cause the mortgage to be recorded in the clerks' or registers' offices of the respective proper counties; second—to hold the same and receive for account of the mortgages the payment due thereunder under the terms of this agreement, and indorse the same thereon; third—to pay over the moneys and securities so received to the mortgagees; fourth—upon the payment to
259 said trustees in the manner in this agreement provided, of the whole amount of cash and second-mortgage bonds to be paid by the company on the delivery and acceptance by the mortgagees in lieu of cash of the balance of said first-mortgage bonds remaining unsold, after the first day of August, eighteen hundred and seventy-three, to cause said bond to be canceled and delivered up to the company, and said mortgage, dated January twenty-eighth, eighteen hundred and seventy-three, to be fully satisfied and discharged of record in all the counties where the same shall be recorded. And said Trenor W. Park and William Butler Duncan hereby covenant and agree to deliver at the signing hereof to the trustees a full and perfect satisfaction piece of the mortgage as aforesaid belonging to them as their act and deed to divest, cancel and release all their right and title under said mortgage, and consenting to a discharge of the same of record, the same to be held by the trustees for the use and benefit of and as custodians for the company; the same to be delivered to the company whenever they shall have complied with the conditions herein in respect to the payment of money and second-mortgage bonds; such satisfaction to be deemed and taken as the act and deed of the party at the time of its delivery to the trustees, subject only to defeasance on the failure of the company to perform the conditions of payment above provided; fifth—the trustees are hereby authorized by the company, out of any moneys coming to their hands and belonging to it, to make the payments in the proportion and manner above provided for it. And in like manner and proportion to pay over second-mortgage bonds of the company in their custody under the consolidation agreement

above referred to; and upon the expiration of the time limited for the full performance of this agreement, if the full amount of money and securities due have not been paid by the company, or
260 applied by the trustees to the account of the mortgagees; or if at any time prior thereto, the company shall have made default in these conditions, the trustees shall deliver such bond and mortgage, with the satisfaction piece, to the mortgagees; sixth—inasmuch as the said Sherman is, at the [illegible] hereof, beyond seas, it is agreed that if he shall fail or refuse to join in the acceptance of this trust, the mortgagees shall have the option to nominate another trustee in his place, whose signature and assent to this writing shall have the same effect as if he had been named therein in the place of said Sherman; and in the meantime the trust shall be deemed complete in the said Seligman and Brown, and be in all respects performed by them, except that they shall not be held bound to apply any moneys or securities of the company in their hands under the consolidation agreement without consent of their cotrustee under said agreement, and the appointment of the company made in accordance therewith. It is further agreed that the trustees shall not be responsible for each other's acts, and only liable respectively for gross neglect in the performance of their trust; seventh—this agreement shall be binding upon the parties, their respective successors, heirs, executors, administrators and assigns.

In witness whereof, the company has caused its common corporate seal to be hereunto affixed, and the same to be attested by the signature of its president and secretary, by authority of a resolution of its board of directors, duly passed at a meeting of said board, held at the office of the company, in the city of New York, on the sixth day of February, eighteen hundred and seventy-three, and the party of the second part have hereunto set their hands and
261 affixed their seals the eleventh day of February, in the year one thousand eight hundred and seventy-three.

NEW YORK, BOSTON AND MONTREAL RAILWAY CO.,
By GEORGE H. BROWN, *President.*
TRENOR W. PARK. [L. S.]
W. BUTLER DUNCAN. [L. S.]

Signed, sealed and delivered in the presence of—

C. G. LINCOLN.
[L. S.] HERBERT M. HYDE.

Attest: JNO. S. SCHULTZE, *Secretary.*

We, Jesse Seligman and John Crosby Brown, named as trustees in the foregoing instrument, do hereby, each for himself, accept the trust therein expressed to be thereby created and reposed in us and William Watts Sherman or his substitute.

In witness whereof, we have hereunto set our hands and seal

this — day of February, one thousand eight hundred and seventy-three.

WM. H. GILLEN. [L. S.]
THEO. M. LILIENTHAL. [L. S.]
JESSE SELIGMAN. [L. S.]
J. CROSBY BROWN. [L. S.]

The last-named exhibit was objected to by the counsel for each of the defendants as immaterial, but the objection was overruled and each of the defendants excepted.

Plaintiffs' counsel also offered in evidence from said printed case the agreement marked Exhibit No. 22, as follows:

"22."

This agreement, made this third day of April, A. D. 1873,
262 by and between the New York, Boston and Montreal Railway Company, a corporation created by and under the laws of the States of New York and Vermont and of the Commonwealth of Massachusetts, of the first part, and Jesse Seligman, William Watts Sherman and John Crosby Brown, Esquires, of the second part, witnesseth:

Whereas, under the agreement called the disbursement trust agreement, which was heretofore and on the eleventh day of February, A. D. 1873, executed by and between the said parties of the first and second parts, the said parties of the second part were directed and instructed to set aside, appropriate and apply the proceeds of certain of this company's first-mortgage bonds and certain of this company's second-mortgage bonds in the manner provided for with relation to the "Harlem Extension" debt in and by the 4th division or section of the said agreement.

And whereas, the said company, party of the first part, had, prior to the execution of the said trust agreement, entered into its agreement with Messrs. Trenor W. Park and William Butler Duncan, mortgagees, etc., of the railways, etc., that formerly were of the Harlem Extension Railroad Company, and had in and by said agreement covenanted, stipulated and agreed with Messrs. Park and Duncan, mortgagees, that the proceeds and avails of the said first-mortgage bonds and the said second-mortgage bonds should be appropriated and applied by the said trustees, parties hereto of the second part, in the manner, as in its such agreement with Messrs. Park and Duncan is particularly mentioned and defined.

And whereas, it has been found upon comparison of the said two agreements that a discrepancy exists between the manner of the application and appropriation of the proceeds and avails of the said first-mortgage bonds and of the said second-mortgage
263 bonds, as defined and provided for in the said trust agreement, and as defined and provided for in the said agreement with Messrs. Park and Duncan, mortgagees.

And whereas, it was the intention, purpose and desire of said company to have provided in the said trust agreement that the dis-

position, appropriation and application of said proceeds, and of the said bonds, should be in entire accordance with this company's said agreement with Messrs. Park and Duncan, mortgagees, and in the manner defined therein, and not otherwise; and whatever discrepancy exists in respect thereof was overlooked in the execution of the said trust agreement, and should now when discovered be rectified.

And whereas, unless the disposition, application and appropriation of such proceeds and bonds be made in the manner so agreed upon between the company and Messrs. Park and Duncan, mortgagees, this company may fail to acquire the railways of the said Harlem Extension Railroad Company, which are essential to the uses and purposes of this company.

Now, therefore, this agreement witnesseth, that for and in consideration of the premises, and in order to carry out and fulfill its said contract with Messrs. Park and Duncan, mortgagees, and in correction of the mistake and error that in this respect became incorporated in the said trust agreement, the said company doth change, modify and alter the provisions of the said trust agreement, so far as they do or can in anywise be deemed to conflict with or vary from the covenants, provisions and agreements by or on behalf of this company in its said agreement with Messrs. Park and Duncan, mortgagees, mentioned and contained; and doth hereby empower, instruct and direct the said parties of the second part that in their application, disposition and appropriation by them of the proceeds of the first-mortgage bonds and of the second-mort-
264 gage bonds that shall come into their hands applicable to the Harlem Extension debt payment, they shall be governed by, and conform to, and comply with the covenants, stipulations and agreements in that respect mentioned and set forth in the said agreements between this company and Messrs. Park and Duncan, mortgagees, which are hereby substituted for and in lieu of the provisions in that behalf, so as aforesaid erroneously embraced in the said trust agreement, with like effect in all respects as if the provisions thereof had originally and continuously been as now rectified, altered and modified.

In witness whereof, the said company hath caused its corporate [SEAL.] seal to be hereunto affixed, and the same to be attested by its president and secretary, the day and year first above written.

THE NEW YORK, BOSTON AND MONTREAL RAILWAY COMPANY,
By GEORGE H. BROWN, *President.*

Attest: JNO. H. SCHULTZE, *Secretary.*

This exhibit was also objected to by the counsel for each of the defendants as irrelevant and immaterial, but such objection was overruled and each of the defendants excepted.

Plaintiffs' counsel also offered in evidence Exhibit No. 23, being an agreement between the New York, Boston and Montreal Rail-

way Company, William Butler Duncan and Trenor W. Park, and the Central Vermont Railroad Company, dated November 23, 1873, being the same agreement which hereinafter appears annexed to the complaint in the action of Marvin Sackett against Russell C. Root and others. This exhibit was also objected to by counsel for each of the defendants on the same grounds as last above. (Same ruling and exception.)

265 Plaintiffs' counsel then offered in evidence Exhibit No. 24, being a bill in chancery in the State of Vermont, brought by William Butler Duncan and Trenor W. Park against James C. Hull and wife, Charles G. Lincoln, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as its receiver, for the foreclosure of the five-million mortgage above referred to. This evidence was objected to by Mr. Larocque as irrelevant and immaterial. (Objection overruled and exception taken.)

Plaintiffs' counsel also offered in evidence from the records of the clerk's office of the county of Rensselaer, the entire record of an action in this court in which Marvin Sackett was plaintiff and Russell C. Root, and The Harlem Extension Railroad South Coal Transportation Company, and The New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, were defendants. (Objected to by Mr. Larocque and Mr. Jennings as inadmissable in evidence against Mr. Duncan and Mr. Park's administrator.)

Mr. Hale, on behalf of the defendants The Central National Bank of Boston and the other defendants, holders of receiver's certificates, objected to that part of the record which shows independent judgments against the corporation for certain amounts of money in favor of persons who were not parties to the action, as not being properly part of the judgment record, and not binding upon or in any way affecting the rights of the defendants represented by him, and as immaterial and incompetent as to such defendants, and he made special objection upon the above-stated grounds, to the notice signed by R. E. Andrews, petitioner, dated May 19, 1881, and to the petition signed by R. E. Andrews, dated May 18, 1881; to the order made at special term May 20, 1881, entitled in the suit of

266 Sackett *v.* Root; also to the report in favor of Sylvanus Carpenter, signed by E Smith Strait, referee, dated June 28, 1881; also to the judgment in favor of said Carpenter, dated June 30, 1881; also to the report and judgment, dated June 30, 1881, in favor of Marvin Sackett; also to the judgment in favor of William F. Taylor for $2,500; also to the report and judgement in favor of Henry A. Tilden, for the sum of $23,967.37. Said objections were each of them overruled, and Mr. Hale, on behalf of said defendants, excepted to the rulings in each case.

Mr. McCurdy and Mr. Yard respectively objected to the said portions of said record excepted to by Mr. Hale, upon the same ground, and also to the admission in evidence of any of the proceedings had before Strait, referee, as having been without notice to the attorneys for the plaintiff in the case, and as being binding upon no person here represented, and being no proper part of the

judgment-roll in said action. These objections were all overruled, and exceptions taken on behalf of each of said defendants.

The said record was then put in evidence as follows:

"25."

STATE OF NEW YORK, }
City and County of New York, } ss:

Joseph Childs, being duly sworn, says that he is more than twenty-one years of age; that on the 23d day of September, 1880, at the city of New York, to wit, the Union Club room, corner of Fifth avenue and Twenty-first street in said city, he served the annexed summons and complaint, affidavit and notice of motion on Daniel Butterfield, one of the defendants therein named, by delivering to and leaving with him personally copies thereof; that
267 he knew the person so served to be the person mentioned and described in the summons as Daniel Butterfield, one of the defendants therein.

JOSEPH CHILD.

Sworn to this 25th day of September, 1880, before me—
B. J. DOMAS,
Notary Public, N. Y. Co.

268 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

To the above-named defendants:

Take notice, that upon the affidavit and the verified complaint, copies of which are annexed, and upon all the papers filed or served on you in this action, the undersigned will move the court, at a special term to be held at the city hall, in the city of Kingston, in the county of Ulster, on the 1st day of October, 1880, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order, that an injunction issue herein according to the
269 prayer of the complaint, and for the appointment of a receiver of the property, effects, and franchises which were of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company in this State, and were purchased by James C. Hull, conveyed by said Hull and Charles G. Lincoln to the defendant, The New York, Boston and Montreal Railway Company, as alleged in said complaint, with the usual directions, and for such other relief as may be just.

Yours, &c.,
McCLELLAN & BROWN,
Attorneys for Plaintiff, Chatham Village, Columbia County, N. Y.

CITY AND COUNTY OF NEW YORK, *ss.:*

William L. Finn, being duly sworn, says that he is over twenty-one years of age and resides in the city of New York, and that on the 7th day of September, 1880, at the city of New York, he served the summons in this action, together with a copy of the complaint, affidavit, and notice of motion hereto annexed, on The Harlem Extension Railroad South Coal Transportation Company, defendant in this action, by delivering a copy of said summons and said copy complaint to Russell C. Root, to me known to be the president of said The Harlem Extension Railroad South Coal Transportation Company, personally, and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as defendant in this action.

WM. L. FINN.

Sworn to before me this 9th day of September, 1880.

A. M. CARD,
Notary Public (59), *N. Y. Co.*

270 CITY AND COUNTY OF NEW YORK, *ss.:*

William L. Finn, being duly sworn, says that he is over twenty-one years of age and resides in the city of New York, and that on the 7th day of September, 1880, at the city of New York, he served the summons in this action, together with a copy of the complaint, affidavit, and notice of motion therein mentioned on Russell C. Root, defendant in this action, by delivering a copy of said summons and said copy complaint to such defendant personally, and by leaving the same with said Root. He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant in this action.

WM. L. FINN.

Sworn to before me this 9th day of September, 1880.

A. M. CARD,
Notary Public (59), *N. Y. C.*

STATE OF NEW YORK, }
City and County of New York. }

William L. Finn, being duly sworn, says that he is over twenty-one years of age; that on the 7th day of September, 1880, at the city of New York, he served the annexed summons and complaint, affidavit, and notice of motion, on The New York, Boston and Montreal Railway Company by delivering copies thereof to John S. Hoyt, vice-president of said company, defendant therein named, he being acting manager thereof, by delivering to and leaving with said Hoyt personally a copy thereof; that he knew the person so served to be the person mentioned and described in the summons as the defendant therein.

WM. L. FINN.

Sworn to this 9th day of September, 1880, before me—
A. M. CARD,
Notary Public, N. Y. C.

271 At a special term of the supreme court of the State of New York, held at the city of Albany, on the 31st day of August, 1880.

Present: Hon. T. R. Westbrook, justice.

In the Matter of the Petition of MARVIN SACKETT for Leave to Join Daniel Butterfield, a Receiver Appointed by this Court, as Defendant in an Action Therein.

On reading and filing the petition of Marvin Sackett, and his proposed complaint in an action in this court, which he proposes to commence, both duly verified, for an order that petitioner have leave to join Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, as defendant in an action to be brought by him, as therein set forth; on motion of H. W. McClellan, of counsel for the petitioner, Marvin Sackett, it is ordered that said petitioner, Marvin Sackett, have leave to join Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, as defendant in the action to be brought by him, on the grounds mentioned in the said petition and set forth in the said complaint.

Enter in Rensselaer county.

T. R. WESTBROOK.

272 To Daniel Butterfield, receiver of the New York, Boston and Montreal Railway Company:

Take notice of an order, of which the foregoing is a copy, made and entered as herein required.

Yours, &c., McCLELLAN & BROWN,
Attorneys for the Petitioner.

Dated August 31st, 1880.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

To the above-named defendants:

Take notice that upon the affidavit and the verified complaint, copies of which are annexed, and upon all the papers filed or served on you in this action, the undersigned will move the court, at a special term to be held at the city hall, in the city of Kingston, in

the county of Ulster, on the 18th day of September, 1880, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order that an injunction issue herein, according to the prayer of the complaint, and for the appointment of a receiver of the property, effects and franchises which were of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company in this State, and were purchased by James C. Hull, conveyed by said Hull and Charles G. Lincoln to the defendant, The New York, Boston and Montreal Railway Company, as alleged in said complaint, with the usual directions, and for such other relief as may be just.

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Yours, &c., McCLELLAN & BROWN,
Attorneys for Plaintiff, Chatham Village, Col. Co, N. Y.

Dated August 31st, 1880.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

COUNTY OF COLUMBIA, *ss:*

Marvin Sackett, being duly sworn, says: That he is the plaintiff named in the above-entitled action, and verified the same. That he has actual knowledge of the truth of said complaint from examination of the writings, records or copies thereof of the various organizations, transfers, and of the legal proceedings and records of conveyances therein referred to; he has personal knowledge of the taking possession of the said railroad by said Root and said transportation company, and of the acts and circumstances attending the same, and of the manner of its management and its present condition as compared with its former condition, from personal inspection and examination of the same, and from his personal acquaintance with the same ever since it was constructed, he living on the line of said railroad and frequently being a passenger thereon, and he knows of the lack of any agreement on the part of said Root to pay anything for the use of said road, or of any agreement to surrender the possession of said road back, from reading a copy of an answer served in an action in the supreme court, wherein said transportation company is the defendant, verified by said Root as its president, and of his intention to continue in possession of the said road until the event of its incorporation by its bondholders, as alleged in said complaint from a letter written after an interview, and of an interview and conversation by Mr. Bloodgood, the person who principally acted in putting Mr. Root in possession of the said railroad; and that from all deponent's examinations and knowl-

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edge and information and belief, deponent has entire confidence in the substantial truth of every material allegation contained in the said complaint.

MARVIN SACKETT.

Sworn to before me this 30th day of August, 1880.

GEO. McCLELLAN,
Notary Public.

275 Supreme Court, County of Rensselaer.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH COAL Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

McCLELLAN & BROWN,
Plaintiff's Attorneys.

Office and post-office address, Chatham village, Columbia county, New York.

276 Supreme Court, County of Rensselaer.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH COAL Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

The plaintiff Marvin Sackett, in behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who hold any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit, complains against Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as receiver of the New York, Boston, and Montreal Railway Company,

defendants, and alleges as and for his complaint the following, constituting his cause of action:

That prior to the times hereinafter mentioned, the Lebanon Springs Railroad Company was a duly organized corporation, formed under and pursuant to the act of the legislature of the State of New York, entitled "An act to authorize the formation
277 of railroad corporations, and to regulate the same," passed April 2d, 1850, and the acts amendatory thereof, and as such, had all the rights and franchises of a railroad corporation of, in, and to the several pieces and parcels of land constituting the track and roadway of a railroad, starting from Chatham Four Corners, was the village of Chatham, in Columbia county, New York, and extending northerly and easterly to the eastern boundary of this State, in the town of Hoosick, in the county of Rensselaer, New York, and extending from thence to the village of Bennington, in the State of Vermont, together with all the rails, bridges, fences, stations, station-houses, buildings, and other structures thereon and all the appurtenances thereunto belonging, and the rents, incomes and profits thereof, and with all the powers, rights and franchises of a railroad corporation. That thereafter as such corporation, on or about the 1st day of July, 1867, it duly issued and sold the bonds of the said company to the amount of two millions of dollars or thereabouts, to individuals and to towns, the greater part thereof within this State.

That to secure the payment of the said bonds the said Lebanon Springs Railroad Company, on or about the 1st day of July, 1867, duly mortgaged all their property and franchises to the Union Trust Company of New York, for an amount equal to the amount of their bonds so issued and disposed of in trust to secure the payment of the said bonds, as by reference thereto will more fully appear.

That the said mortgage was at the time of the foreclosure and sale hereinafter mentioned the first mortgage upon the property and franchises of the said Lebanon Springs Railroad Company, and the said bonds bore interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, and the principal thereof was payable thirty years after the date thereof, but by a provision thereof the whole principal
278 became due in the year 1870, by reason of non-payment of interest thereon.

That the plaintiff is holder and owner of the said bonds of the said company to the amount of eight thousand seven hundred dollars. The towns within this State through which said road runs being owners of some of said bonds of the face value of two hundred and forty-six thousand dollars.

The town in which plaintiff resides, owning one hundred thousand dollars thereof. This is not counting the interest upon any of said bonds, none having been paid thereon since 1870.

And plaintiff further shows that thereafter certain proceedings were had, pursuant to the statute of this State in such case made and provided, the object and purpose of which was to effect a consolidation of the Lebanon Springs Railroad Company and the Ben-

nington and Rutland Railroad Company; and, to effectuate such purpose, an agreement to consolidate was executed by said two companies, dated December 31st, 1869, by which it was agreed to consolidate said railroad companies under the name of the Harlem Extension Railroad Company, which company assumed the payment of the aforesaid bonds, with interest thereon, after January 1st, 1870. That from the time of said agreement the said railroad was run, operated and occupied a portion of the time by lessees until on or after the 25th day of January, 1873.

That on or about the 22d day of February, 1872, the said Union Trust Company, as trustees as aforesaid under said mortgage, for default in the payment of moneys secured thereby, by an action in the supreme court of this State, commenced the foreclosure of the said mortgage, given as aforesaid by the said Lebanon Springs Railroad Company, wherein the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan and James B. Hodskins were defendants, which proceedings
279 were continued to judgment; and on the 25th day of January, 1873, the entire property of both of said companies within this State was, by a referee duly appointed by the court in that behalf, duly sold under said judgment at Greenbush, in the county of Rensselaer, and conveyed to James C. Hull for the nominal sum of $100,000, for the use and benefit of the aforesaid bondholders, no part of which purchase price has been paid, as plaintiff states on information and belief, said Hull being a clerk or employé of William Butler Duncan, or of the copartnership firm of Duncan, Sherman & Co.; said Duncan, as one of said firm, owning a large amount of said bonds, and acting for and in behalf of all of said bondholders.

That at about the same time, proceedings had been had in the court of chancery, in the State of Vermont, by which all the property and franchises of the said company in said State had been sold under mortgage foreclosure proceedings to Charles G. Lincoln, a clerk or employé of one Trenor W. Park, another holder of said bonds, likewise for but a nominal sum, and for the use and benefit of all the said bondholders. And thus said Hull and Lincoln became the purchasers, and received the deeds on such foreclosure sale of the whole property of the said corporation in this State, and in the State of Vermont, in reality and fact, as agents of the bondholders as aforesaid, and for and in behalf of the owners of the aforesaid bonds of the Lebanon Springs Railroad Company.

That prior to said mortgage sale, and in January, 1873, proceedings had been instituted, and which were believed to have been effectually executed, whereby the said Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company had been consolidated under the name of the New York, Boston and Montreal Railway Company, and, in order to avoid any risk or loss to the bondholders under said two-million mortgage, and in contemplation of the last-mentioned consolidation,
280 said Hull and Lincoln, nominal purchasers as aforesaid, made, executed and delivered to said William Butler Dun-

can and Trenor W. Park, who were the representatives and agents of the said bondholders, a mortgage upon all the property so as aforesaid purchased by them, for the sum of $5,000,000, and cotemporaneous therewith, and in order to effectuate said consolidation, conveyed the whole of the property so purchased and mortgaged by them to the said New York, Boston and Montreal Railway Company, subject to the mortgage so given as aforesaid to said Duncan and Park, for these bondholders as aforesaid.

That said railroad, pending the actual consolidation, continued to be run by said Duncan and Park, as trustees, and in the interest of the bondholders aforesaid, till on or about the 3d day of November, 1873, when, by an instrument in writing, duly executed by the said Duncan and the said Park, and the said New York, Boston and Montreal Railway Company, a copy whereof is hereunto annexed, marked Schedule A, and forms part of this complaint, the said railroad and all its appurtenances and property were leased to the Central Vermont Railroad Company.

That the foreclosures, purchases and the lease were made for the sole benefit and advantage of the owners of the aforesaid bonds under said two-million mortgage.

That the said railroad property and effects were never in the actual possession or custody of the New York, Boston and Montreal Railway Company, and that in all the agreements of consolidation the indebtedness of the said bonds to the owners thereof was assumed by the several companies respectively.

That under said agreement contained in Schedule A, the Central Vermont Railroad Company occupied and operated the said railroad and property until on or about the 20th day of August, 1877, when, under said agreement contained in Schedule A, they surrendered the said road and property back again to said Duncan
281 and Park, from whom they received the same, who were still acting for and in behalf of the said bondholders. That from thence the said railroad was not in operation until the time hereinafter mentioned when the defendant, Russell C. Root came into the possession thereof; that during all this time the said New York, Boston and Montreal Railway Company was notoriously and hopelessly insolvent, which insolvency culminated in the due appointment by the supreme court of Daniel Butterfield as receiver of its property and effects.

That on or about the 24th day of August, 1877, said Duncan and Park, or one M. H. Bloodgood and A. B. Gardner, or one or more of said persons, acting for and in the name of the owners of the Lebanon Springs Railroad Company's bonds, or assuming so to act, took formal possession of all the said real estate and railroad property and effects, in the name of and for the benefit of the said bondholders, the said railroad lying unoperated or run, and said person or persons allowed the defendant, Russell C. Root, to run and operate the same, without, as said Root alleges and claims, any agreement, covenants or stipulation in regard to his occupation whatever, as plaintiff states on information and belief, and without any agreement to pay anything for the same, and as plaintiff states, on infor-

mation and belief, said Root announces and gives out that he expects and intends to operate and continue in the management of said railroad until a corporation may or shall be organized which shall become vested with the title thereto, and authorized to possess and operate the same.

That said Root so occupied said railroad property until on or about the 27th day of November, 1877, when a company was organized under the general manufacturing act and acts of this State, of which said Root was and still is the president, by the name of "Harlem Extension Railroad South Coal Transportation Company,"
with a capital of $2,000, which was soon thereafter nominally
282 given possession thereof by said Root, its president, and from thence hitherto, the said last-named company have claimed to occupy and use the whole of the said property and effects, being the property of the plaintiff and the others, holders of the bonds of the Lebanon Springs Railroad Company. That said railroad property is now and for a long time past has been in constant use, and in consequence of entire neglect to do any more repairs than are absolutely necessary to allow it to be used at all, without the supplying of new material in such repairs, and the removal in some places of side tracts for the purpose of using the old material thereof in repairs upon the direct single track, thus disabling and by non-use allowing to be wrecked and destroyed the said tracks, turnouts and turn-tables upon the line of said railroad, all of its fixtures and appurtenances being nearly worn out and these deficiencies not being supplied, and its value continually depreciating more and more the longer such use continues, and all this without a farthing being paid to any person by the party occupying said premises or by any other person.

That on or about the 29th day of November, 1879, as plaintiff states, upon information and belief, a portion of the said property so occupied as aforesaid, was sold by the county treasurer of the county of Rensselaer, for non-payment of taxes thereon, and was purchased by some person or persons to the plaintiff unknown; annexed, marked Schedule B, which forms part of this complaint, is a copy of the notice under which said property was sold, and that unless soon redeemed, the said property sold will be entirely lost to the present owners thereof.

Whereby there is continually loss being sustained by the real owners of said property, the plaintiff and others, bondholders as aforesaid.

That on the contrary, said railroad, by any fair and honest and prudent management, might and could and would pay something
upon the said bonds, keep the said railroad improving, and
283 pay all expenses and taxes in so doing, thus providing something to pay upon said bonds, no payments having been made thereon for more than ten years last past, and said railroad property being the only source from which any payments thereon can ever be realized, and that unless relief can be obtained in this court, the said property will be rendered worthless, and the plaintiff and the others, bondholders, remediless in the premises.

That in addition to individual interest and benefits it is very essential to the welfare and prosperity of the towns through which said railway is constructed, owners of bonds, as aforesaid, that the same should be maintained in good condition and efficiently operated. That for this purpose the bondholders to a large extent, desire to organize a corporation, pursuant to the laws of this State, for the purpose of operating and maintaining said railway and franchises, but as plaintiff is advised and believes, there is no power upon the part of said towns to become parties to or to assent to such an organization. That experience has shown it is impracticable to operate and maintain said road efficiently by any unincorporated company on behalf of the bondholders. That the said bonds have little or no market value. That it is very desirable that the said property and franchises be sold, the plaintiff believing and alleging that a much larger sum can be obtained and realized by the bondholders for their property on a distribution of the proceeds of a sale of the railroad and franchises than can be obtained for the bondholders by a sale of their bonds.

Wherefore the plaintiff demands that it may be adjudged:

First. That the New York, Boston and Montreal Railway Company have no title to the said Lebanon Springs Railroad Company or its franchises or property as against the holders of the bonds so as aforesaid issued under said mortgage for the $2,000,000,
284 and in whose behalf and for whose benefit said railroad company was purchased by said James C. Hull on the foreclosure sale as aforesaid, and that as against the said New York, Boston and Montreal Railway Company and the receiver as aforesaid of said company, the said bondholders are entitled to hold and possess said railroad company, its property and its franchises.

Second. That said Russell C. Root and said Harlem Extension Railroad South Coal Transportation Company may be adjudged to have no right or interest to the possession of the said railroad property; that a proper and fit person may be appointed as receiver of said company, purchased on the aforesaid foreclosure sale, and its franchises, to operate and maintain said railroad company, and to hold and reserve its profits and franchises for the benefit of the bondholders as aforesaid.

Third. That an injunction be granted that the defendants and each and every of them and all and every person acting by authority of any or either of them be restrained from interfering with the said railroad property in any way or manner, and from disposing of the same.

Fourth. That a receiver of the whole of the said property, railroad and franchises may be appointed by the court with usual powers and duties of receivers in like cases, until such time as said property and franchises may be sold under a judgment in this action, or a company or corporation formed by the bondholders to run and operate the same.

And lastly, that said railroad and franchises may be sold for the

benefit of the bondholders and distribution made thereof, and for such other relief in the premises as to the court shall seem just.

McCLELLAN & BROWN,
Attorneys for Plaintiff, Chatham Village, Columbia County, New York.

285 STATE OF NEW YORK, } ss.:
County of Columbia, }

Marvin Sackett, the plaintiff named in the foregoing complaint, being duly sworn, says: That he has read the foregoing complaint and knows the contents thereof, and the same is true to his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

MARVIN SACKETT.

Sworn to before me this 30th day of August, 1880.

GEO. McCLELLAN,
Notary Public.

SCHEDULE A.

The indenture, made and executed this third day of November, A. D. 1873, by and between the New York, Boston and Montreal Railway Company, a corporation duly incorporated under and in pursuance of the laws of the State of New York, the party of the first part to these presents, and William Butler Duncan, of the city of New York, and Trenor W. Park, of the State of Vermont, the parties of the second part hereto, and the Central Vermont Railway Company, a corporation duly incorporated under the laws of the State of Vermont, the party of the third part hereto, witnesseth:

That whereas, that certain railroad company heretofore and lately known as the Harlem Extension Railroad Company, and owning and operating its railroad from the town of Rutland, in the State of Vermont, to the village of Chatham Four Corners, in the State of New York, and from the village of North Bennington, in the State of Vermont, to the New York State line, have been, together with certain other railroads duly and in pursuance of law
286 consolidated into the New York, Boston and Montreal Railway Company, the party of the first part hereto, which last-named company is now the owner of the said line of railroad and its franchises, subject to the lien of the mortgage hereinafter next mentioned.

And whereas, the said parties of the second part hereto have a good, valid and subsisting mortgage for the principal sum of $5,000,000 upon the said Harlem Extension railroad and its appurtenances and every part thereof, which said mortgage fell due on July 1st, A. D. 1873, and a large portion of the money secured thereby is yet overdue and unpaid.

And whereas, the parties of the second part have agreed with the said party of the first part to extend, upon certain conditions,

the time of full payment of said mortgage to the 1st day of July, A. D. 1874.

And whereas, also, the said parties of the second part are the owners of all and singular the rolling stock of every kind and description whatsoever, now used or operated on said Harlem Extension railroad, with the exception of certain cars belonging to the United States Rolling Stock Company, and so marked.

And whereas, also, the said parties of the second part are the absolute owners of all fuel and other supplies of every nature, and the shop, stock and tools of every name and description, and all other personal property of every kind and character, now upon or along the line of and designed for use in operating said Harlem Extension railroad.

And whereas, also, the said parties of the second part have the actual possession and control of the said Harlem Extension railroad and all and every of its appurtenances, and said rolling stock and other personal property, and the said road is now being run and operated by them.

Now, therefore, it is hereby agreed by and between the said parties of the first, second and third parts hereto, as follows, that is to say:

287 That the said parties of the first and second parts, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part of the party of the third part, its successors and assigns, to be paid, kept and performed, have leased, demised and to farm let, and by these presents do lease, demise and farm let (according to their respective interests, as above described, in the property to be hereby demised) unto the said party of the third part, its successors and assigns, all that line of railroad heretofore and lately known as the Harlem Extension railroad, extending from the town of Rutland, in the State of Vermont, to the village of Chatham Four Corners, in the State of New York, and from the village of North Bennington, in the State of Vermont, to the New York State line in the direction of and on the line to Troy, and all the said rolling stock thereon belonging to said parties of the second part, and now used in operating said railroad, all shops, house buildings, depots, stations and appurtenances of every kind, character and nature whatsoever. To have and to hold the said above mentioned and described premises and property, with the appurtenances, unto the said party of the third part, its successors and assigns, from the 1st day of November, 1873, for and during and until the time when the party of the first part, its successors or assigns, puts in operation its line of railway from High Bridge, on the Harlem river, State of New York, to the said village of Chatham Four Corners, connecting with the line of said Harlem Extension railroad at that place, and fully makes the payments hereinafter and in the manner provided to be made by it, its successors or assigns, to the party of the third part, its successors or assigns, and then fully to be complete and ended. Yielding and paying therefor unto the parties of the first and second parts, their successors, heirs or assigns, in the order and manner

hereinafter provided, yearly and every year during the time
288 and term hereby granted, the yearly sum or rent of fifteen per centum of the annual gross receipts and earnings of the said Harlem Extension railroad, in equal half-yearly payments, viz., on the 1st day of May and November, in the year 1874, and in each year thereafter during said term, and yielding and paying therefor at the expiration or other sooner determination of this lease, in the same ratio, for any portion of a half year that may have expired at the time when this lease is determined. And also yielding and paying therefor on the 1st day of November, 1874, and in each year thereafter during the term, an additional one per centum of the annual gross earnings of the said road for every $36,000 increase in the said annual gross earnings over and beyond the yearly gross sum of $360,000. And also yielding and paying therefor at the expiration or sooner determination of this lease this additional one per centum in the same ratio, for any portion of a year that may have expired at the time when this lease is determined. But not in any event shall the rent exceed thirty per centum of the gross earnings.

Provided always, nevertheless, that if the rent above reserved, or any part thereof (after making the deductions hereinafter specified, which then have accrued), shall be behind or unpaid on any day of payment whereon the same ought to be paid as aforesaid, for the space of sixty days, then and from thenceforth it shall and may be lawful for the said parties of the second part, their heirs or assigns, into and upon the said demised premises and property, and every part thereof, wholly to re-enter; and the said parties of the second and first parts hereto, their heirs, successors or assigns (according to their respective interests as above described in the property demised), the same to have again, repossess and enjoy, as in their or its first and former estate, anything herein contained to the contrary notwithstanding.

It is further stipulated, covenanted and agreed, by and between the parties hereto, as follows, viz:

289 First. That the said party of the third part hereto, its successors or assigns, shall and will, during the continuance of this lease, perform all the duties and obligations imposed by law upon the party of the first part, in respect to running and operating its road, including the making of all reports required by law, and shall and will run and operate said railway at its or their own proper expense, costs and charges in accordance with law, and at their own risk in every respect whatever, and shall and will at their own proper costs and charges (except as hereinafter provided), keep the same in good order and repair, and so redeliver the same at the expiration or other sooner determination of this lease, ordinary wear and tear only excepted, and shall and will save and keep harmless the parties of the first and second parts, their successors, heirs and assigns, of and from all loss or damage which they or either or any of them may sustain in consequence of any acts or omissions of the party of the third part, its successors or assigns, in operating said road during the continuance of this lease.

Second. That the said party of the third part, its successors or assigns, shall and will, at its or their own proper costs and charges, bear, pay and discharge all such taxes, duties and assessments (including assessments for highway labor) of every kind and nature as shall or may, during the said term hereby granted, be charged, assessed or imposed upon the said demised premises and property.

Third. That the said party of the third part, its successors or assigns, shall and will purchase of the parties of the second part, their heirs or assigns, all their said supplies, shop stock and tools, along and upon the said road, at the time this lease goes into effect, and pay for the same within sixty days thereafter as per inventory and valuation, to be made and agreed on by the parties of the second and third parts hereto, and in case they shall fail to agree,
290 then the same shall be made by three disinterested persons, one of whom is to be chosen by each of the said parties of the second and third parts, and the other to be selected by the two so chosen.

Fourth. That the party of the third part, its successors or assigns, shall and will well and truly pay, or cause to be paid, unto the said parties of the second part, their heirs or assigns, out of and as a part of the rent herein reserved, and for the use or rent of the said rolling stock belonging to the parties of the second part, at present on said road, the sum of $875 each month, to be paid unto the said parties of the second part, their heirs or assigns, and the same shall be a charge against the party of the first part, its successors or assigns, and shall be first paid by the party of the third part, its successors or assigns, out of the rents falling due, and as fast as the same fall due under this lease and hereinabove provided, to be paid by the party of the third part, its successors or assigns.

Fifth. That the said party of the third part, its successors or assigns, shall and may at all times during the term lay down and put in such new iron rails and tracks, or reroll the old rails and lay them, as may, in the judgment of the party of the third part, be required to place, maintain and keep in good and substantial repair and condition the said railroad, and shall and may dispose of the old iron and rails at the best advantage, if it or they decide, or so much as they decide not to reroll; and the said party of the third part, its successors or assigns, shall and may, as occasion may require during the term, erect and put in any further permanent repairs, structures and improvements along and upon said road, as in their judgment may be requisite and necessary to keep and maintain it in good running order and substantial repair and condition, such as depots, station buildings, bridges, bridge abutments and such like; and shall and may also build and finish the
291 erection of the freight depot, now in the process of erection, at the said town of Rutland; and the said party of the third part, its successors and assigns (after first making the payments to the parties of the second part, their heirs or assigns, specified in article 4th), shall and may charge and offset the cost of the respective items mentioned in this article, viz., the cost of new rails, or rerolling old rails, after deducting the price obtained for all old rails

sold, and the cost of making any permanent repairs or improvements, and erecting the said Rutland freight depot, against the rent hereinbefore reserved to be paid by the party of the third part, its successors and assigns; and the same shall and may be deducted by the party of the third part, its successors or assigns, from the said rent falling due, and as fast as the same falls due under this lease, and the outlays and expenditures contemplated and provided for in this article shall be a first charge upon the rent herein stipulated to be paid, after paying the parties of the second part, their heirs and assigns, said rent for the use of the rolling stock as aforesaid.

It is further stipulated, covenanted and agreed by and between the parties hereto, that at the expiration of the term herein granted, and before the party of the first part, its successors or assigns, shall demand or take possession, as a condition precedent to obtaining possession of the said road, premises and property herein demised, the said party of the first part, its successors and assigns, shall well and truly pay, or caused to be paid, unto the said party of the third part, its successors or assigns, any sum of money or excess that may be due to the said party of the third part, its successors or assigns, for the use of rolling stock, as paid for and specified in article 4 above, for iron furnished or rerolled, for other permanent repairs or improvements made, and for the cost of erecting the said freight depot, all as specified in article 5th, over, above and beyond the rents reserved in this indenture or lease, to be paid by the
292 party of the third part, its successors or assigns, if there should be any such sum or excess, together with interest on such sums at the rate paid by the party of the third part, not exceeding twelve per cent. per annum. Provided always that the party of the third part, its successors and assigns, shall be limited to the sum of twenty-five thousand dollars ($25,000) for the first year, for permanent improvements other than the iron and track and the Rutland freight depot, unless the party of the first part shall consent to a larger expenditure.

And it is further stipulated, covenanted and agreed by and between the parties hereto, that at the same time and upon like conditions, the said party of the first part, its successors and assigns, shall and will purchase of the party of the third part, its successors or assigns, all fuel and supplies of every kind, and all shop stock and tools then used upon or along the line of said leased road in operating the same, and shall and will pay for the same as per inventory and valuation, to be made and agreed upon by the parties of the first and third parts hereto, their successors or assigns, and, in case they shall fail to agree, then the same shall be made by three disinterested persons, one of whom to be chosen by each of the two parties, their successors or assigns, and the other to be selected by the two so chosen.

And the said party of the third part, for itself, its successors and assigns, does further covenant and agree to and with the said parties of the first and second parts, their successors, heirs and assigns, by these presents, that the said party of the third part, its successors and assigns, shall and will, at the time and in the manner and order

above limited and prescribed, pay or cause to be paid unto the said parties of the second and first parts, their heirs, successors or assigns, the rent above reserved, after making the deductions above provided to be made, according to the true intent and meaning of these presents.

And that on the last day of the term, or other sooner de-
293 termination of this lease, the said party of the third part its successors or assigns, shall and will peaceably and quietly leave, surrender and yield up unto the said parties of the first and second parts, their successors, heirs or assigns, all and singular the demised premises and property, according to their respective interests in the same as aforesaid.

Provided that if this lease terminates after July 1st, 1874, and said recited mortgage is not then fully paid, then and in that event, the said party of the third part, its successors and assigns, shall and will peaceably surrender and yield up the said demised premises unto the said parties of the second part, their heirs or assigns, free from any claim or demand of the party of the first part, their successors or assigns.

It is further agreed between the parties hereto, that the party of the third part shall keep all the buildings, bridges and other insurable property properly insured in good and responsible companies.

And it is further provided, that in the event of loss by fire or freshet exceeding in the aggregate, at any one time, $500, the parties of the first part will pay all cost, expense and damage caused thereby, in excess of said sum of $500 as aforesaid. And if said loss shall occur by fire, the amount of said insurance upon the property so destroyed shall, after payment of said $500 as aforesaid, be applied by the parties of the third part to the payment of said loss for the benefit of the parties of the first and second parts.

And it is further agreed between the parties hereto, that the party of the third part shall, within sixty days after the rents hereby reserved become payable, render a just and true account of the gross receipts of the road hereby leased, and also of all expenditures made under this lease, and that the parties of the first and second parts, or their duly authorized agents, shall have access to the books of the party of the third part at all times.

294 In witness whereof, the parties of the second part hereto affix their names and seals, and the parties of the first and third parts have caused their official seals to be affixed, and
[L. S.] this instrument to be executed by their respective presidents in triplicate.

NEW YORK, BOSTON AND MONTREAL RAILWAY CO.,
By GEORGE H. BROWN, *President.*
[L. S.] T. W. PARK.
[L. S.] W. BUTLER DUNCAN.
[L. S.] CENTRAL VERMONT RAILROAD CO.,
By J. GREGORY SMITH, *President.*

SCHEDULE B.

County Tax Sale.

Whereas, the State and county taxes for the year 1877, imposed pursuant to the laws for the assessment and collection of taxes upon the following-described lands and property, situate in the city of Troy and towns in the county of Rensselaer, remain due and unpaid. Now, therefore, notice is hereby given, in pursuance of the power vested in me by law, I shall, on the twenty-ninth (29th) day of November next, at the court-house, in the city of Troy, at ten a. m., commence selling at public auction the said lands and property hereinafter described and on which the taxes, interest and charges shall not have been paid for the lowest term of years of which any person shall offer to take the same in consideration of advancing the sum necessary to discharge the taxes, interest and charges for publishing the list of lands and property and conducting the sale, and shall continue to sell until the same shall be completed. The purchasers at said sale are to pay the amount of their respective bids to the county treasurer of said county within forty-eight hours after the sale, and will receive a certificate in
295 writing, describing the land and property so purchased, the sum paid, the time to which the purchaser may be entitled to the possession thereof, and after the expiration of two years from day of sale to receive conveyance of same as mentioned in the certificate, subject to the lien of any assessments for improvements made by the city of Troy or towns in the county, unless the owner or any persons shall, within two years, redeem the same according to law.

"TOWN OF STEPHENTOWN.

"*Corporations.*

"Harlem Extension Railroad Company, eight miles of railroad in town of Stephentown..... ..... $854 37

"TOWN OF HOOSICK.

"*Corporations.*

"Harlem Extension Railroad Company, five and three-quarter- miles railroad in town of Hoosick..... 389 30

"TOWN OF PETERSBURGH.

"*Corporations.*

"Harlem Extension Railroad Company, one hundred acres, eight and a half miles superstructure..... 2,229 18

"TOWN OF BERLIN.

"*Corporations.*

"Harlem Extension Railroad Company, sixty-three and seven-eight-s acres iron tiles, building, etc., bal..... 54 12

"Treasurer's office, Troy, October 8, 1879.

"EDMUND FITZGERALD,

"*County Treasurer, Rensselaer County, N. Y.*"

296 Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

Russell C. Root and the Harlem Extension South Coal Transportation Company, answering the complaint in this action, by P. W. Ostrander, their attorney, say as follows:

I. They admit that the Lebanon Springs Railroad Company was a duly organized corporation prior to July 1, 1867, as alleged in said complaint, and that such corporation issued bonds to a large amount, but to what amount and to whom these defendants have not knowledge or information sufficient to form a belief, and they therefore deny the allegations in said complaint as to amount and persons and corporations to whom issued and localities where issued.

II. They admit the mortgage to the Union Trust Company, as stated in folios 5 and 6 of said complaint.

297 III. That defendants have not knowledge or information sufficient to form a belief whether or not plaintiff is holder and owner of eight thousand and seven hundred dollars of said bonds or any of said bonds, and has not knowledge or information sufficient to form a belief whether or not the town in which said plaintiff lives is holder and owner of one hundred thousand dollars of said bonds, and said defendants therefore deny the allegations in that behalf in said complaint contained.

IV. As to what, if any, proceedings were taken concerning a proposed consolidation of the Lebanon Springs Railroad Company and the Bennington and Rutland Railroad Company, and the alleged assumption by the Harlem Extension Railroad Company of the payment of said bonds, with interest, after January 1st, 1870, and as to the allegation in said complaint, that from the time of such alleged agreement, said railroad was run, operated and occupied a portion of the time by lessees, until on or after January 25th, 1873; these defendants have not knowledge or information sufficient to form a belief, and they therefore deny each and every the allegations in that behalf in said complaint contained.

V. These defendants admit the allegations in said complaint contained, as to the foreclosure of said mortgage (made to the Union Trust Company) by said Union Trust Company, and judgment and sale and conveyance of the entire property of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and they admit also the proceedings in the court of chancery in the State of Vermont, as stated in said complaint, except that they deny, upon information and belief, that the purchase price, under the sale in the proceedings in this State, to wit, one hundred thousand dollars, was a "nominal" sum, and they deny, upon information and belief,

that the property conveyed by the deed to James C. Hull,
298 mentioned in said complaint, was sold and conveyed to him for the use and benefit of the bondholders mentioned in said complaint; and except, also, that defendants say, upon information and belief, that the purchase price aforesaid was actually paid, and they further say that said property was conveyed to said James C. Hull, individually, by Charles S. Fairchild, referee in the foreclosure proceedings above mentioned by deed, dated January 25th, 1873. "To have and to hold the property and premises in said deed mentioned, and described and conveyed, or intended so to be, unto the said party of the second part" (said James C. Hull), "his heirs and assigns to his and their only proper use, benefit and behoof forever." And as to whether or not said Hull was a clerk or employé of William Butler Duncan or of Duncan, Sherman & Company, and as to whether or not said Duncan as one of said firm then owned a large amount or any amount of said bonds, and as to whether or not Charles S. Lincoln, named in said complaint, was or was not a clerk or employé of Trenor W. Park in said complaint named, or whether said Park was at the time mentioned in said complaint another holder of said bonds, defendants say that they have not knowledge or information sufficient to form a belief, and they therefore deny all the allegations in that behalf in said complaint contained; and except also that the defendants upon information and belief deny that said Lincoln bought the property referred to in the complaint (sold as aforesaid in chancery proceedings in the State of Vermont) for a "nominal" sum, or for the use and benefit of all of said stockholders; and except that these defendants upon information and belief deny that said Hull and Lincoln became the purchasers and received the deeds on such foreclosure sales in reality and in fact as agents of said bondholders, or in behalf of the said Lebanon Springs Railroad Company, but to the contrary thereof, that they severally purchased said property and took such title to
and for themselves absolutely in fee and in their own right
299 individually and not as trustees or agents; and except also that the defendants deny upon information and belief that said Duncan and Park or either of them was then acting for and in behalf of all of said bondholders.

That these defendants admit the consolidation of the Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company, under the name of the New York, Boston and Montreal Railway Company, and they admit that said Hull and Lincoln made and executed a mortgage to William Butler Duncan and Trenor W. Park, for the amount stated in said complaint; but they have no knowledge or information sufficient to form a belief as to whether or not any "proceedings" had been instituted prior to said mortgage "sales which were believed to have been effectually executed," whereby said roads were consolidated, and they therefore deny the allegations in that behalf in said complaint contained, and they deny upon information and belief, that "in order to avoid any risk or loss to the bondholders," under said two-million mortgage, and in contemplation of the last-mentioned

consolidation, said Hull and Lincoln, nominal purchasers as aforesaid, made, executed and delivered to said William Butler Duncan and Trenor W. Park, who were the representatives and agents of the said bondholders, a mortgage upon all the property so as aforesaid purchased by them for the sum of $5,000,000, and contemporaneous therewith and in order to effectuate said consolidation, conveyed the whole of the property so purchased and mortgaged by them to the said New York, Boston and Montreal Railway Company, subject to the mortgage so given as aforesaid to said Duncan and Park for the bondholders as aforesaid; but they admit that on the 28th day of January, 1873, said James C. Hull and Charles G. Lincoln did execute a mortgage on the premises purchased by them as aforesaid to William Butler Duncan, of New York, and
300 Trenor W. Park, of Bennington, Vermont, to secure the payment of $5,000,000 on the 1st day of August, 1873, with interest thereon, and they admit that on the 30th day of January, 1873, said James C. Hull and Melissa A. Hull, his wife, as individuals and not as trustees or agents, conveyed, by deed of that date, to the New York, Boston and Montreal Railway Company, all the property and premises conveyed, or intended to be conveyed, to said Hull by said Fairchild, referee as aforesaid, "to have and to hold said premises, property and franchises unto the said party of the second part, its successors and assigns, to its and their only proper use, benefit and behoof forever," subject to the mortgage last above described, which deed contained covenants of further assurance and against grantor's acts; and defendants are informed and believe, and upon information and belief they state, that on or about the same date as the last-mentioned deed, the said Charles G. Lincoln, individually, executed to said New York, Boston and Montreal Railway Company a deed, in precisely the same terms as the one last recited, of the premises purchased by him as aforesaid in the chancery proceedings in the State of Vermont aforesaid, subject to said mortgage to said Duncan and Park.

VI. These defendants admit that the road referred to was for a time run by said Duncan and Park, but upon information and belief deny that it was so run by them as trustees for or in the interest of said bondholders, and these defendants admit the leasing of said road at the time and as shown in the complaint by Schedule "A," annexed thereto, to the Central Vermont Railway Company, but upon information and belief they deny that the foreclosure purchases and the lease were made for the sole benefit and advantage, or at all for the benefit and advantage, of the bondholders under the two-millions mortgage aforesaid, or in any way, or for any reason, for their benefit or advantage.

301 VII. That upon information and belief these defendants deny that said road was never in the actual possession of the New York, Boston and Montreal Railway Company; but it's the contrary thereof. They allege, upon information and belief, that said road was in the actual possession of said New York, Boston and Montreal Railway Company. In the same manner they deny that in all the agreements of consolidation the indebtedness of said

bonds to the owner thereof was assumed by the several companies respectively.

They admit that said Central Vermont Railway Company operated said road under the lease called Schedule "A," attached to the complaint, which lease was executed by the New York, Boston and Montreal Railway Company party of the first part, William Butler Duncan and Trenor W. Park, parties of the second part, and the Central Vermont Railway Company, party of the third part, and was dated November 3d, 1873, until some time in or about August, 1877, and then surrendered said road under said agreement; but on information and belief these defendants deny that said Duncan and Park, or either of them, were then acting for or in behalf of said bondholders.

VIII. These defendants admit that from the last-mentioned date until defendant Root took hold of it, which was on or about October 16th, 1877, said railroad was not operated, and upon information and belief defendants say that this period of inoperation was about six weeks.

IX. That as to the period or the quality of the insolvency of the New York, Boston and Montreal Railway Company these defendants have not knowledge or information sufficient to form a belief, and they therefore deny the allegation in that behalf in said complaint contained, but they admit that Daniel Butterfield was duly appointed by the supreme court of State receiver of its prop-
302 erty, and they allege on information and belief that such appointment was made on or about the year 1874, by said supreme court of this State, and that said Butterfield duly qualified as such receiver, and has never been displaced, removed or discharged from the said office, place and duty as such receiver but still occupies the same and is such receiver.

X. That these defendants have not knowledge or information sufficient to form a belief as to whether or not said Duncan and Park or M. H. Bloodgood and said B. Gardner, or one or more or any of said persons assuming to act for and in the name of the owners of the Lebanon Springs Railroad Company bonds took formal or any possession of the real estate, railroad property and effects mentioned in said complaint in the name and for the benefit of said bondholders, and these defendants therefore deny the allegations in that behalf in said complaint contained, and these defendants upon information and belief deny that they, said persons, or any of them did take such possession, acting for said bondholders, and said defendants on information and belief allege that no authority to take such possession was ever given to such persons or to any of them to so take possession of said property.

But these defendants admit that said road was lying unused when defendant Root began to run trains over it, and they admit that he so undertook to run and did run cars and trains over said described track, not only by the consent and desire of certain of the persons named, to wit, said Duncan, Park and Bloodgood, but also by the desire of a large number if not all the inhabitants on the line of said track, Henry A. Tilden and the plaintiff Sackett included, in

order that persons living on and near said track might be accommodated in the transportation of their persons and property, from which, to the great inconvenience and loss of all the vicinity, they had been to a large extent debarred by said road ceasing to be operated.

303 And defendant Root denies that he "announces and gives out that he expects and intends to operate and continue in the management of said railroad until a corporation may or shall be organized, which shall become vested with the title thereto and authorized to possess and operate the same."

XI. These defendants admit the allegations in the complaint contained as to the formation of the corporation defendants, The Harlem Extension Railroad South Coal Transportation Company, and their use and occupation of said track and property, but they deny, upon information and belief, that said track and property are the property of the bondholders aforesaid; and they deny all the allegations in said complaint contained as to the condition of said track and property, and the manner of its use and alleged abuse, and it being permitted to depreciate; the removal of side tracks to repair the single direct track; and all the allegations charging want of care or improper, wasteful or reckless use of said track, materials and property. Defendants admit that they have paid no one for the use of said track anything, and they say that they have not done so, because, first, they do not know of any one to whom to pay unless it be the defendant, Daniel Butterfield, as receiver as aforesaid, and he has never demanded any pay; and, second, because it has required all the earnings of the road, in the miserable condition in which it was left, to operate and run trains over said track, and to put and keep it in usable condition; and said returns have been so entirely used and applied.

XII. That as to the allegations in the complaint contained, beginning at folio 22, with regard to an alleged sale of a portion of said property by the treasurer of the county of Rensselaer for non-payment of taxes thereon defendants say:

304 First. That said taxes referred to in said complaint and appended notice were assessed upon said road and property prior to said defendants having any charge, care or use thereof. That all taxes and assessments which have accrued on said premises and property since said defendants, or either of them, have operated the road have been paid by them; and that defendant Root, since he began to operate the road, was informed by plaintiff, whom he had obtained to look into the matter of whether there were any prior unpaid taxes or assessments, that he, plaintiff, had examined and found that all the taxes and assessments were checked off; and that no sales for taxes or assessments had been made, and that nothing was required to be done till further notice, or words to that effect.

Second. That he is advised by counsel learned in the law that the time to redeem said property will not expire until on or about November 29th, 1881; and defendants deny, upon information and belief, that plaintiff and other bondholders are the real owners of

said property, and that by reason of any of the acts, condition or things charged in said complaint said plaintiff and others, bondholders, are continually sustaining loss. And defendants deny that in the present condition of things, state of said track, lack of connection with neighboring and through or trunk roads, and in the lack of large capital to relay and restock said road, and of the means to make it useful to other roads, that "it is possible by any fair, honest and prudent management said road might, could or would, pay something upon the said bonds, keep the said railroad improving and pay all expenses and taxes in so doing, thus providing something to pay on said bonds." And defendants say they are advised, and so they charge the fact to be, that these circumstances, however deplorable, furnish no reason in law why these bondholders or any other persons should have a right to seize said road, or have its custody or possession awarded or decreed to them, or the custody or possession thereof be
305 taken from any one in whom it may now be, or these defendants deprived of operating the same at the instance of this plaintiff, or at all in this action. And defendants further say that as matter of law they are advised and charge that whether or not any payments have been made on said bonds for more than ten years last past is not any reason why plaintiff should have judgment or relief in this action, and as matter of law they are advised and charge and allege said railroad property is not a legitimate or possible source from which any payments on said bonds can be made; and defendants say that said property will not be rendered worthless unless relief can be obtained in this court, and upon information and belief, and as matter of law, defendants charge and claim that plaintiff and the other bondholders have rendered themselves remediless, if they are so, by not having combined and purchased in said road when it was sold under the mortgage given to the Union Trust Company to secure the very bonds now held by them.

XIII. That as to the said road being maintained in good condition and efficiently operated, being essential to the welfare and prosperity of the towns through which said railway is constructed, the desire of the bondholders to organize a corporation to operate said road and the want of power of towns to become parties to or assent to such an organization, defendants say they have not knowledge or information sufficient to form a belief, and they therefore deny the allegations in that behalf in said complaint contained.

Defendants admit that, in its present state and condition, it is impracticable to maintain said road efficiently by any unincorporated company on behalf of any one. These defendants admit that said bonds have little or no value, and they allege, as the reason therefor, that said bonds stand unsecured, the bondholders
306 having permitted the road to be sold under the mortgage intended to secure said bonds without attempting to purchase or without bidding it in, and thus saving their security. These defendants, being advised and believing that said bondholders have no interest or property, right, title or claim of any kind in said

road, its franchises, property, etc., deny that it is desirable that the same be sold, and as matter of law they claim and allege that it and they, said property, etc., cannot be sold in this action, and that if said property, road, franchises, etc., would be sold, that the proceeds could not be divided among said bondholders.

As to all and every allegation in said complaint contained, not in this answer specifically admitted or denied, these defendants, on information and belief, deny each and every thereof.

For a further and separate answer to said complaint, these defendants say, upon information and belief, that said complaint does not contain facts sufficient to constitute a cause of action, and they claim the same benefit from so much of this their answer — if they had demurred to said complaint upon such ground.

And these defendants pray that said complaint be dismissed, with costs.

P. W. OSTRANDER,
Attorney for Defendants Russell C. Root and The Harlem Extension Railroad South Coal Transportation Company.

Office and post-office address, No. 99 Nassau street (Bennett building), New York city.

307 CITY AND COUNTY OF NEW YORK, *ss:*

Russell C. Root, being duly sworn, says: That he is individually one of the defendants in above-entitled action, and president of The Harlem Extension Railroad South Coal Transportation Company, another of defendants in this action; that he had read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

R. C. ROOT.

Sworn to before me this 25th day of September, 1880.

WM. W. LADD, JR.,
Notary Public for Kings Co.

Certificate filed in New York city and county.

308 At a special term of the supreme court of the State of New York, held at the city hall, in the city of Kingston, on the 1st day of October, 1880.

Present: Hon. T. R. Westbrook, justice.

Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railroad Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

On reading and filing the complaint herein, duly verified, and the affidavit of Marvin Sackett on part of the plaintiff, and the answer of Russell C. Root and the Harlem Extension South Coal Transportation Company, and the affidavit of said Root and P. W. Ostrander on the part of defendants, and after hearing H. W. McClellan for plaintiff and E. Newcomb and P. W. Ostrander for defendants, and it thereby appearing to this court that the real property, franchises and effects which were of the Lebanon
309 Springs Railroad Company, the Harlem Extension Railroad Company and the New York, Boston and Montreal Railroad Company within this State have, by transfers thereof made, properly become the property of the plaintiff and others, first-mortgage bondholders of the Lebanon Springs Railroad Company, and that said property and franchises are allowed by parties assuming to act for the said bondholders, as set forth in the complaint or otherwise, to be left with one or more of the defendants or other person therein referred to, to be operated and used and worn out and suffered to deteriorate in value, and without providing in any way for compensation therefor to the owners thereof, or to any person, and it being desirable that the absolute ownership and right of possession of said franchises and property should be determined, and in the meantime that the same should be protected and preserved, and the income therefrom saved for the owners thereof, now, on due proof of the service of the notice of motion, and on motion of H. W. McClellan, of counsel for the plaintiff,

Ordered, that John W. Van Valkenburgh, of the city of Albany, in the county of Albany and State of New York, be and is hereby appointed receiver of all the rights and franchises which were owned, held and possessed by the Lebanon Springs Railroad Company, or by any of the defendants herein, at any time of, in or to the several pieces or parcels of land constituting the track or roadway of a railroad extending and starting from the village of Chatham, in Columbia county, New York, and extending northerly and easterly through the counties of Columbia and Rensselear to the eastern boundary of this State, in the town of Hoosick, in the said county of Rensselaer, together with all the rails, bridges, fences, stations, buildings and structures thereon, and of the estate and franchises of said company, and of all the powers, rights, privileges and authority thereto appertaining, of the rents, tolls, and incomes, of the title deeds, leases, contracts and leased property, and of
310 all the rights thereunder, wherever any or all of said property may be situated, collected, exercised or enjoyed, whether in

the State of New York or also in the State of Vermont, so far as the laws of that State will allow, and of all the books, papers and vouchers, including the book of minutes kept by the railroad company, and in use up to and at the time of the foreclosure sale of the railroad property.

All power and authority herein given, to be held and exercised for the public convenience, and for the protection of those interested in said railroad and franchise.

And said receiver is also hereby authorized to run and operate said road, and for such purpose to employ such rolling stock as may be needed, to use and preserve said property in proper condition, to repair and renew all existing structures, and make all requisite additional structures as may be useful and proper for safe and effectual transportation on said railroad, and to do all proper acts and take all proper measures for protecting and securing the possession, use and enjoyment of what he shall or should receive hereunder, and for promoting the business of said railroad; and he is hereby authorized to retain and employ all such persons, and to take such advice as may be reasonably needful and proper in and about the discharge of his duties under this order, and generally do or cause to be done in respect to the property, franchises, rights and contracts, and of whatever else, of which he is appointed receiver, any and all things which, but for this order, might be or should be done by said railroad as a company, or any one in its behalf, including the compromise and adjustment of all claims, and the direction and control of all suits and legal proceedings, now or to be pending by or against said railroad; and all attorneys and counsel now representing said railroad, are required to act in the prosecution and defense of such suits and procedings, under the direction of said receiver, and on his request to give place to others.

311 That the said receiver is authorized to institute such suits and proceedings in this State and elsewhere, as in his judgment and by the advice of counsel shall be deemed proper and for the advantage of the property and rights to him committed, and to pay the proper expenses of the same, and also any judgment that may be recovered against him as such receiver, in any suit, and to defend all suits and proceedings affecting his receivership; to pay all legal expenses attending his appointment as receiver, and in all cases in which he has any reasonable doubt as to his duty, to apply to this court in this suit for instructions.

Said receiver is hereby authorized, upon taking possession as receiver, to at once enter upon and take possession of all stations, apartments and offices of, or occupied by said railroad, and of the contents thereof, of all the property, premises, erections and whatever is thereon belonging to said railroad, or of which it has any right of possession or control, whether the same be held by lease or otherwise, and of everything of which he is appointed receiver; to require of its agents or employés, or any person or persons in possession, a delivery and surrender to him of whatever they or either of them have or hold by virtue of their relations to said railroad or belonging thereto, and that said receiver may take all proper pro-

ceedings for the recovery of the same in whatever States it may be necessary to proceed; and it is further ordered that the said receiver, acting under and in pursuance of this order, and in good faith and with ordinary care and prudence, shall not be individually liable for any breach of or upon any contract entered into by him as such receiver, or for any injury to person or property, or for the faults or negligence of his subordinates, or for any loss, damages or liabilities not occasioned by his own gross neglect or willful misconduct; and it is further ordered that said receiver do cause to be ascertained, prepared, as near as he may be able to do, and file a state-
312 ment of the bonds of said railroad, and who owns and holds the same; that said receiver do prepare and file a statement, to be verified by him, of all moneys and funds which he shall receive upon entering upon the discharge of his trust as receiver; that said receiver do cause to be prepared and filed a general schedule of the rolling stock, specifying the amount of each kind and generally of the supplies, fuel and material, furniture and other miscellaneous personal property of said railroad which he may receive as receiver.

And it is further ordered that any moneys received by him as such receiver, beyond any amount needed for his payments, be kept by him on deposit in some suitable bank or banks, to his order as receiver.

And it is further ordered that said receiver execute his bond to the people of this State in the penalty of $5,000 conditioned for the faithful performance of his duty as receiver herein, with at least two sufficient sureties, freeholders in this State, to be approved as to form and sufficient security by a justice of this court, and to be filed in the office of the county of Rensselaer before entering upon the discharge of his duty as such receiver.

And it is further ordered that the defendants in this action and each and every one of them, and all persons do refrain from interfering with or obstructing such receiver or his possession or use of said offices, premises, franchises and property, and in taking possession of the same.

Enter in Rensselaer county.

T. R. WESTBROOK,
Justice Supreme Court.

Filed October 7th, 1880.

JAMES KEENAN, *Clerk.*

313 STATE OF NEW YORK, }
City of Troy, County of Rensselaer, Clerk's Office. }

I hereby certify that I have compared the annexed copy of order with the original thereof, filed in this office on the 7th day of October, 1880, and that the same is a correct transcript therefrom and of the whole of said original.

[L. S.] In testimony whereof I have hereunto set my hand and affixed my official seal this 7th day of October, 1880.

JAMES KEENAN, *Clerk.*

Supreme Court, County *op* Rensselaer.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I do hereby certify that the security required by the order of this court, made on the 1st of October, 1880, in the above action, to be given by John W. Van Valkenburgh, receiver therein, has been acknowledged and filed in my office, agreeably to the order of this court, and duly approved by Hon. C. R. Ingalls, one of the justices of said court.

Dated Troy, October 11th, 1880.

[L. S.] JAMES KEENAN, *Clerk.*

314 New York Supreme Court, Rensselaer County.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

STATE OF NEW YORK,
Ulster County, } *ss.:*

P. W. Ostrander, being duly sworn, says: That he is an attorney and counselor at law, and is attorney and of counsel for the defendants, Russell C. Root and The Harlem Extension Railroad South Coal Transportation Company. That he yesterday, personally, fully examined the mortgage made by James C. Hull and wife and Charles G. Lincoln to William Butler Duncan and Trenor W. Park for $5,000,000, dated February 28, 1873, upon the records at the clerk's office of Rensselaer county, at the city of Troy, N. Y., and read through the same as there recorded in Book 137 of Mortgages, pages 344–346; and deponent says that said mortgage is made to said Duncan and Park, their heirs and assigns forever, and not to them as trustees; and does not mention any trust, nor in any way allude to or make mention of any other person or person's benefit, behoof or advantage save said Duncan and Park's; nor in any way create or recognize or speak of any charge thereon for the advantage of any one else, or subject said mortgage to any lien, incumbrance or duty, nor in any way mention the Lebanon Springs Railroad Company, save where, in the description of the property mortgaged, reference is made to the former ownership by said Lebanon Springs
315 road of a part of the property; and deponent says that nowhere in said mortgage are any bondholders of said Lebanon Springs road even mentioned or in any way alluded to.

P. W. OSTRANDER.

Sworn to before me this 1st day of October, 1880.

J. M. SMITH,
Notary Public.

Supreme Court, Rensselaer County.

MARVIN SACKETT
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company.

STATE OF NEW YORK, *City and County of Albany,* } ss:

Russell C. Root, being duly sworn, says: He is one of defendants in this action, and president of the Harlem Extension Railroad South Coal Transportation Company.

That the reason for his having taken the trouble to run this road over the track formerly of the Lebanon Springs Railroad Company is to make an outlet for the Bennington and Glastonbury
316 railroad, and take to market charcoal and lumber in which he and the company of which he is president defendants are interested, and that this is the sole advantage of operating the road to him.

That the advantage of his operating it to the owners thereof is preventing it from rapidly going to decay and ruin, which it would necessarily and certainly do if not used, and the repairs and care which in order to use it all must necessarily be given to it, and which he and his said company have given to it and are constantly doing.

That the advantage to persons living and doing business on the line and adjacent thereto, or in its neighborhood, is the facilities of transportation of persons and property afforded by it.

That deponent and his said company run regular over said track two trains daily, one morning and one evening each way.

That it is not true that deponent or his said company have destroyed any turnouts; that the turn-table (there never was but one) mentioned in the complaint herein was rotted out and useless when deponent first began to run trains over said track and remains still just where it was and in about the same condition as when deponent first began to run over said track.

That as to the removal of side track mentioned in said complaint, deponent says that the station where said side track had been was already closed when deponent first began to run as aforesaid, and a new one had been opened at North Stephentown, two miles south of the old station, but the side track had not yet been removed and deponent merely took part of it up from where it was no longer of any use, and put it down at North Stephentown, the substituted station, where it was needed, and should have been put.

That the tax sale alluded to is on a tax levied or assesssed in September, 1877, and which was so assessed on the property before deponent began to run over said track.

317 That deponent began to run on or about October 16th, 1877, and about or shortly after that date sent plaintiff to Albany or Troy, or both, to see if there were any back taxes, and said Marvin Sackett, plaintiff as aforesaid, returned and reported to deponent that he had seen and examined the lists and that there were no sales, the taxes were all checked off, nothing was required to be done or would be till further notice; or words to that effect, and deponent says, to the best of his recollection he has given said Sackett's exact language; that deponent has never received any notice about said tax or taxes, or sale or sales, or heard anything about them, either from the treasurer, comptroller or from said Sackett or any other source until commencement of this action.

That deponent and his said company have kept in repair all the bridges, fences, culverts, trestles, etc., since they began to run over said road, and kept said road in good ordinary repair and working order.

That if it had laid idle since deponent and his company have been running over it said track would be impossible to be used, and it and said bridges, culverts, fences, etc., would have so deteriorated as to have become almost worthless.

That deponent and his said company are the possessors of the engines, cars, rolling stock, tools, etc., and none of it in any way belongs to the plaintiff or the bondholders mentioned in the complaint, nor have they or any of them any title to or interest in the same or any thereof.

That from deponent's knowledge of the circumstances and surroundings of said road and other roads deponent is satisfied that it would be impossible to hire or obtain any other engines and rolling stock, etc.

Deponent further says that his operating this road has been and is of great advantage to all neighboring country on or near its line for travel, transportation and traffic.

318 That since his commencing to run over the road there have been built lime kiln and furnaces for making charcoal to supply iron furnaces on the line of the Harlem road, and that the stoppage of this road would stop the supply of charcoal to these furnaces, as any other route would so increase the freight as to leave no profit to manufacturers and would undoubtedly close both the charcoal kilns and the furnaces.

Deponent further says that he is informed and believes that there are two mortgages covering the property, franchises, etc., named in the complaint (with other property and franchises) both of record in this State in the counties through which said track runs, one made by the New York, Boston and Montreal Railway Company to J. Seligman, N. W. Sherman and J. C. Brown for $12,250,000 and one made by the same company to the New York Loan and Indemnity Company for $12,750,000.

Deponent further says that all of the net earnings of the road, and much more besides, have been expended by him and his company on said road, and that said road is now in much better con-

dition and worth much more than when deponent first began to run trains over it.

R. C. ROOT.

Sworn to before me this 30th day of September, 1880.

SIMON MEYERS,
Commissioner of Deeds, Albany, N. Y.

Know all men by these presents, that we, John W. Van Valkenburgh, of the city and county of Albany, State of New York, Timothy J. Sullivan, of city and county of Albany, State of New York, Joseph Walter, of city and county of Albany, State of New York, and Samuel O. Vanderpoel, of city and county of Albany, State
319 of New York, are held and firmly bound unto the People of the State of New York, in the sum of $5,000, lawful money of the United States of America, to be paid to the said The People of the State of New York, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 9th day of October, 1880.

That whereas, at a special term of the supreme court, held at the city of Kingston, in the State of New York, before Hon. T. R. Westbrook, one of the justices of said court, it was then and there and by an order bearing date the 1st day of October, 1880, in an action in said court pending, wherein Marvin Sackett is plaintiff, and Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railroad Company and Daniel Butterfield, as receiver of the New York, Boston and Montreal Railroad Company, are defendants, among other things, ordered that John W. Van Valkenburgh, of the city and county of Albany, State of New York, be appointed receiver of all the rights and franchises which were owned, held and possessed by the Lebanon Springs Railroad Company, and so much thereof as lies within the State of New York, or any of the defendants herein at any time of, in or to the several pieces or parcels of land, rails, fences, buildings, bridges, stations and structures thereon, and the estate and franchises of said company, and of all the powers, rights and privileges and authority thereto appertaining, of the rents, tolls and incomes, of the title deeds, leases, contracts and leased property, and of all the rights thereunder, and of all the books, papers and vouchers, including the books of minutes kept by said railroad company, as by reference to said order will more fully appear; now, therefore, the condition of this obligation is such that if the above-bounden John W. Van Valkenburgh shall faithfully
320 discharge his duties as such receiver of the estate, funds and effects of the said Lebanon Springs Railroad Company, and of the property and effects by said order in him vested, and in all things comply with the provisions of said order, and in all things obey the directions of any court having jurisdiction over said receiver, and in all things observe and obey the statutes of this State in such cases made and provided, and the rules and practice of any

urt having jurisdiction therein, then the above obligation to be id, otherwise to remain in full force and virtue.

J. W. VAN VALKENBURGH. [L. S.]
T. J. SULLIVAN. [L. S.]
J. WALTER. [L. S.]
S. O. VANDERPOEL. [L. S.]

Sealed and delivered in presence of—
W. W. BRINKERHOFF.

STATE OF NEW YORK, }
ty and County of Albany. }

On this 9th day of October, in the year 1880, before me, the subriber, personally came John W. Van Valkenburgh, Joseph Walter nd Timothy J. Sullivan and Samuel O. Vanderpoel, to me known be the persons described in, and who executed the within inrument, and severally acknowledged that they executed the same.

W. W. BRINKERHOFF,
Notary Public, Albany County.

STATE OF NEW YORK, }
ity and County of Albany. }

Samuel O. Vanderpoel, one of the subscribers to the above underking, being duly sworn, says: That he is a resident and freeholder ithin this State, and is worth the sum of $5,000 over and above all debts and liabilities which he owes or has incurred, and 21 exclusive of property exempt by law from levy and sale under an execution.

S. O. VANDERPOEL.

Subscribed and sworn to before me this 9th day of October, 1880.

W. W. BRINKERHOFF,
Notary Public, Albany County.

STATE OF NEW YORK, }
ate and County of Albany. }

Timothy J. Sullivan, one of the subscribers to the above underking, being duly sworn, says: That he is a resident and freeolder within this State, and is worth the sum of $5,000 over nd above all debts and liabilities which he owes or has incurred, nd exclusive of property exempt by law from levy and sale under n execution.

T. J. SULLIVAN.

Subscribed and sworn to before me this 9th day of October, 1880.

[NOTARIAL SEAL.] W. W. BRINKERHOFF,
Notary Public, Albany County.

STATE OF NEW YORK, }
ity and County of Albany, } ss.:

Joseph Walter, one of the subscribers to the above undertaking, eing duly sworn, says: That he is a resident and freeholder within

this State, and is worth the sum of $5,000 over and above all debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

J. WALTER.

Subscribed and sworn to before me this 9th day of October, 1880.

W. W. BRINKERHOFF,
Notary Public, Albany County.

322 I hereby approve of the foregoing bond, both as to form and sufficiency of the sureties therein.

C. R. INGALLS,
Jus. Sup. Court.

Dated October 11th, 1880.

To the supreme court of the State of New York:

Your petitioner, John W. Van Valkenburgh, respectfully shows, that on the 1st day of October, 1880, he was appointed receiver of the rights, franchises, which were owned, held and possessed by the Lebanon Springs Railroad Company of this State, in an action in this court wherein Marvin Sackett was the plaintiff, and Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railroad Company and others were defendants. That he filed his bond with the clerk of Rensselaer county, as provided in said order, on the 11th day of October, 1880, and duly qualified as said receiver. That the said railroad consists of its right of way, tracks, railroad bridges, turnouts, depots and appendages running from Chatham village through the counties of Columbia and Rensselaer to the Vermont State line. That prior to the twentieth of October instant, the said road was operated and run by one Russell C. Root, as president of one of the defendants above named. That the engines, cars, both passenger and freight, were possessed by the said Root or his said company, and were under his or said company's control. That on the said twentieth day of October instant, the said Root took from said road all of the rolling stock, including engines, and the said road was abandoned and left in the possession of the receiver on that day without any engines or rolling stock, tools or implements necessary to operate the same. That to protect the interest of the parties who claim to own the road, and to preserve the road from deterioration, decay and waste, it will be necessary for your petitioner to
323 operate said road from said Chatham village to said State line. That for that purpose it will be necessary for your petitioner to hire or purchase two engines, passenger coach, baggage, freight, postal, and hand cars. That your petitioner has no funds in his hands belonging to said road, nor have the owners any rolling stock, engines, or moneys in their possession wherewith to furnish the necessary rolling stock to operate the same. That your petitioner has made a contract for the purchase of two engines and necessary cars to operate said road and put it in running order, sub-

ject to the approval of this court. That for the successful operation of the road it is also necessary to put in a turn-table at or near Petersburgh Junction, on the line of said road, and for that purpose it is necessary for your petitioner to purchase the necessary material, consisting of lumber, iron, &c., to construct the same. That it is also necessary for your petitioner's successful operation of said railroad, to purchase shovels, pickaxes, hammers, and various kinds of tools for the necessary repairs and keeping of said road in repair. It is also requisite for your petitioner to employ the necessary workmen on the line of said road, conductors, station agents, and other employés to take charge of the necessary freight and passengers that may use the line of said railroad. That by the order appointing your petitioner herein receiver he is authorized to run and operate said road, and for such purpose to employ such rolling stock as may be needed to use and preserve such property in proper condition, repair and renew all existing structures and make all requisite additional structures as may be useful and proper for the safe and effectual transportation on said railroad, as by reference to said order will more fully appear. That to carry into effect the provisions of said order and successfully operate said road it will be necessary for your petitioner to obtain loans of large sums of money from time to
324 time to purchase the material herein set forth as required to pay the expenses of running said road.

Wherefore your petitioner prays that this court may grant leave to your petitioner to issue certificates of indebtedness in such sums and amounts, not to exceed in the aggregate $25,000, without further permission of the court, as may be necessary to successfully operate said road, with a provision in said certificates that the same shall be paid out of the first net earnings of said railroad, and that this court may declare that all such certificates as may be issued and signed by the receiver for the purpose herein set forth be declared first liens on the moneys in the hands of said receiver, after the payment and discharge by him of the necessary running expenses of said railroad, and for such further or other order as the court may deem proper in the premises.

J. W. VAN VALKENBURGH, *Petitioner.*

STATE OF NEW YORK, }
City and County of Albany, } ss.:

John W. Van Valkenburgh, being duly sworn, says he is the receiver mentioned in the above petition; that he knows the contents thereof and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

J. W. VAN VALKENBURGH.

Sworn to before me this 25th day of October, 1880.

W. W. BRINKERHOFF,
Notary Public, Albany County.

325 At a special term of the supreme court of the State of New York, held in the assembly chamber, at the old capitol, in the city of Albany, on the 25th day of October, 1880.

Present: Hon. A. M. Osborn, justice.

Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railroad Company, and Others, Defendants.

On reading and filing the petition, duly verified, of John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company, praying this court for the instructions in the premises, as in said petition alleged, and for leave to issue certificates of indebtedness not to exceed $25,000 for the purpose of operating the said railroad and providing means for the payment and discharge of said certificates of indebtedness, and after hearing Mr. Edward Newcomb, of counsel for said receiver, and after mature deliberation by the court thereon, it is

Ordered, that the said receiver of the Lebanon Springs Railroad Company, for the purpose of employing such railroad stock and making such improvements, and for the purchase of necessary material, including engines and cars and tools for the operation
326 of said railroad, as provided in said order, the said receiver is hereby authorized and empowered to issue his certificates of indebtedness in the form and figures following, to wit:

"Office of the receiver of the Lebanon Springs Railroad Company.

"No. —. 50 STATE STREET, CITY OF ALBANY, N. Y.

"This is to certify that I, John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company, am indebted unto —— —— or bearer, in the sum of $—, for which sum of moneys herein embraced, are hereby declared to be a first lien upon the net profits of the said railroad company, and to be paid therefrom by the said receiver, with interest. This certificate of indebtedness is issued by the said receiver under the provisions of an order of the supreme court, made at a special term held at the old capitol, in the city of Albany, on the 25th day of October, 1880, and duly entered with the clerk of Rensselaer county on said day."

Given under my hand the 25th day of October, 1880.

And it is further ordered that the said receiver shall insert in the body of each certificate as issued by him for what the said certificates are issued, either for moneys borrowed or pay of employees or purchase of materials.

And it is further ordered and directed that said receiver consummate any and all contracts that he has entered into for the purpose

of the successful operation of said railroad, and all moneys expended by him for said purpose are hereby approved, and said certificates of indebtedness may be issued by said receiver in the liquidation of indebtedness, for the purposes heretofore incurred by him.

Enter in Rensselaer county.

A. M. OSBORN,
Justice Sup. Ct.

JAMES KEENAN, *Clerk.*

327 Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH COAL TRANSPORTATION COMPANY, and Others, Defendants.

To the supreme court of the State of New York:

I, John W. Van Valkenburgh, receiver of the Lebanon Springs railroad, appointed on the 1st day of October, 1880, in above action, hereby make the statement and schedule hereunto of the property and effects that have come to my possession as such receiver as follows, viz.:

At Chatham Village station—About nine or ten acres of land (detached).

At Chatham station—2 freight books "received," 2 freight books "sent," 1 ticket book, 1 ticket stamp, 5 settees, 3 chairs, 1 table, 2 stoves, 3 shovels, 4 chisels, 1 straight, 1 bar, 1 brace and bit, 1 track-level.

At Rayville station—1 stove and pipe, 3 settees, 3 books.

At Brainard station—1 office table, 1 ticket stamp, 3 freight books, 1 stove, 1 bracket lamp, 2 oil cans, 3 lanterns, 3 settees.

At West Lebanon station—3 long chairs, 1 office chair, 1 office desk, 2 freight books, 1 ticket stamp, 1 box stove, 1 green lantern, 1 pinch-bar.

At New Lebanon station—1 pinch-bar, 1 skid, 1 bracket lamp, 1 table lamp, 2 target lamps for switches, 2 white lanterns, 1
328 red lantern, 1 green lantern, 1 white flag, 1 red flag, 1 green flag, 3 switch-locks, 1 shovel, 2 small oil cans, 1 large oil can, about two gallons kerosene oil, 1 pail, 1 coal-hod (worn out), 6 office chairs, 2 inkstands, 1 ticket stamp, 1 half-ticket stamp, 3 stoves (one received from Lebanon Spa), 1 long office table, 1 counter, 2 cupboards, 1 spring balance, 1 car service book, 1 freight classification book, 1 foreign ticket sales book, 1 pay-roll book, 1 tonnage account book. 2 invoice books, 2 letter books.

At Lebanon Springs station—1 pair bag trucks, 1 pinch-bar, 1 stove, 11 lengths pipes, 2 elbows, 1 lamp, 1 lantern, 1 oil can, 1 ticket stamp, 39 checks Lebanon Spa to Albany. 27 checks Lebanon Spa to Hudson, 35 checks Lebanon Spa to New York.

At Stephentown station—2 stoves and pipe, 3 wooden settees, 1 chair, 1 pinch-bar, 2 lanterns, 2 oil cans, 2 lamps, 1 freight received

book, 1 freight forward book, 1 cash book, 1 ticket case, 1 ticket stamp.

At North Stephentown station—1 stove and pipe, 2 settees, 1 arm-chair, 1 desk, 1 ticket case, 1 ticket stamp, 2 oil cans, 1 red lantern, 1 white lantern, 1 red flag, 1 forwarding book, 1 receiving book, 1 set skids.

At South Berlin station—2 settees, 1 bracket lamp, 1 stove and pipe, 2 lanterns, 1 freight forwarding book, 1 freight receiving book, 1 stamp, 1 cash book, 1 ticket record.

At Centre Berlin station—3 lanterns, 1 ticket stamp, 3 books.

At Berlin station—2 books freight received, 1 book freight forward, 1 cash book, 1 day book, 1 ticket book, 1 stove with pipe (broken), 2 settees, 1 bracket lamp, 2 oil cans, 1 table, 1 chair, 2 ticket stamps, 1 ticket case, 1 book-case.

At North Petersburgh station—1 ticket stamp, 1 freight book.

At Petersburgh Junction station—1 ticket stamp, 1 ticket case and tickets, 1 set freight books and blanks, 1 set ticket books
329 and blanks, 1 telegraph register, small stock of stationery, etc., about 20 tons scrap iron, 1 roll plans for cars for N. Y., B. & M. R'y, 1 roll statement of receipts from stations, 1 roll land descriptions in towns of Berlin, Petersburgh and Bennington; 1 bundle Centre Street monthly freight reports, marked No. 3; 1 warranty deed Warren Whitman to Harlem Extension Railroad Company; 1 quitclaim deed F. G. Harwood to Harlem Extension Railroad Company; 1 envelope containing correspondence and agreements in regard to establishing South Berlin station; 1 envelope containing correspondence between Caroline Green, of Stephentown, to M. Y. Tilden, R. J. Niver and others in regard to land damages; also contract and change of highway in town of Hoosick, 1 envelope containing mail contract and correspondence thereon, 1 envelope containing deed of water right for Manchester station, 1 envelope containing lease of gravel pit at Petersburgh, 1 envelope with memorandas on outside, 1 envelope containing deed of water right, G. T. Dennison, of Berlin, and Cornelius McFeely, of Stephentown, to Harlem Extension Railroad Company; 1 contract of right of way and water, between Edward Thompson and Lebanon Springs Railroad Company; envelope containing contracts and forms for water rights, also correspondence between R. J. Niver and M. Y. Tilden; 1 envelope containing articles of agreement between H. C. Wheeler, Jonathan Reynolds, H. M. Wheeler, Edward White and the Lebanon Springs Railroad Company; also deeds, land descriptions and agreements between Bartley Hogeboom, Loring D. Gifford, Louis M. Davis, Allen Reynolds, William Hurst, John B. Davis and Mrs. Nancy Green and the Lebanon Springs Railroad Company; 1 package, marked No. 2, containing legal documents, correspondence, civil-service accounts, foreign ticket accounts, &c.; 1 book bonds, resolution dated May 1st, 1853, payable May 1st, 1873, $1,000 each, at 7 per cent., May and November, numbered 1–250, issued 1 to 89 inclusive, all
330 unissued cancelled; 1 book bonds, resolution dated 1st May, 1853, payable May 1st, 1873, $1,000 each, at 7 per cent., May and November, numbered 251–500, none issued, all canceled; 1

book bonds, resolution dated 1st May, 1853, payable May 1, 1873, $1,000 each, at 7 per cent., May and November, numbered 501–749, none issued, all unsigned; 1 book bonds, resolution dated May 1, 1853, payable May 1, 1873, $1,000 each, at 7 per cent., May and November, not numbered or signed, 219 bonds; 1 book bonds, resolution dated 1st May, 1853, payable May 1, 1873, $1,000 each at 7 per cent., May and November, not numbered or signed, 256 bonds; 1 book bonds, resolution dated 1st May, 1853, payable May 1, 1873, $1,000 each, at 7 per cent., May and November, not numbered or signed, 250 bonds; 1 book bonds, resolution dated 1st May, 1853, payable May 1, 1873, $100 each, at 7 per cent., May and November, numbered 1476–1586, issued 1476–1575 inclusive, 140 unsigned, not numbered and unissued; 1 book bonds, resolution dated 23d July, 1867, payable 1st July, 1897, $100 each, at 7 per cent., January and July, numbered 2376–2625 inclusive, unsigned, none issued; 1 book bonds, resolution dated 23d July, 1867, payable 1st July, 1897, $100 each at 7 per cent., January and July, numbered 2626–2875 inclusive, unsigned, none issued; 1 book bonds, resolution dated 23d July, 1867, payable 1st July, 1897, $100 each, at 7 per cent., January and July, numbered 2876–3126 inclusive, 24 unnumbered, none signed or issued; 1 book stock certificates, numbered 1–500 inclusive, 1–239 issued, 240–500 canceled and never issued by order of the president; 1 book certificates, numbered 501–1000 inclusive, 501–748 inclusive issued, 649–1000 canceled and never issued, 780–1000 unsigned; 1 book bond stocks, dated 23d July, 1867, payable July 1st, 1897, $1,000 each, at 7 per cent., January and July, numbered 1751–1875 inclusive, all issued, 27 unnumbered and unissued, also one (1) bond, numbered 3202, signed and canceled for $1,000; 1 book ticket sales; 1 book marked Ledger A, Lebanon Springs Railroad; 1 book marked Subscriptions to Capital Stock; 1 book marked Blotter; 1 book marked List of Stockholders, January 8, 1870; 1 book marked List Stockholders, May 30, 1868; 1 book marked List Stockholders, October 1, 1868; 1 book marked List Stockholders, March 10, 1869; 1 book marked Letter Book; 1 book marked Receipts for Bonds Issued; 1 book marked List Stockholders, May 31, 1869; 1 book marked Cash Book; 1 book marked Ledger A, Lebanon Springs Railroad; 1 book marked First-mortgage Bonds Register, Lebanon Springs Railroad; 1 check book, 1–245 used, unused 249–530, on Union Trust Company; 1 cash book marked A, Lebanon Springs Railroad.

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That no money or funds were received by me from said company at the time of entering upon the discharge of my trust as such receiver; that no rolling stock of said road came to my possession at the time of entering upon the discharge of my trust as such receiver.

October 20, 1880.

J. W. VAN VALKENBURGH, *Receiver.*

STATE OF NEW YORK, } ss:
Albany City and County, }

John W. Van Valkenburgh, being duly sworn, says he is the receiver named in the foregoing statement and schedules, that the said statement and schedules contain a true and accurate account of all money effects, rolling stock and property of every kind that came to the possession of deponent as such receiver, on the 20th day of October, 1880, the day of his taking possession of said railroad, and of the whole thereof, so far as deponent has been able to ascertain the same.

J. W. VAN VALKENBURGH.

Sworn to before me this 13th day of November.

[L. S.] W. W. BRINKERHOFF,
Notary Public, Albany County.

332 Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

To the supreme court of the State of New York:

Your petitioner, John W. Van Valkenburgh, respectfully shows that on the 1st day of October, 1880, your petitioner was appointed receiver of the Lebanon Spring Railroad Company by this court in an action wherein Marvin Sackett was plaintiff and Russell C. Root and others were defendants; that under said order your petitioner duly qualified and entered into possession of said railroad and its property on the 8th day of October, 1880, and has ever since possessed the same, and now runs said road. Your petitioner further shows, on information and belief, that the first-mortgage bonds on said road amount to the sum of two millions of dollars, with interest unpaid thereon since 1870; that the length of said road is fifty-eight miles, connecting the New York and Harlem railroad at Chatham village, N. Y., with the Bennington and Rutland railroad at Bennington, Vt.

Your petitioner further shows that the road has been operated for about three years last past without putting upon it the repairs necessary for the safety of life and property; that the iron is very badly worn, to an extent on some portions of the road that renders it impossible to run with the speed requisite to make proper railroad connections with Boston and Troy trains at Petersburgh
333 Junction, at Bennington with the Bennington and Rutland, and at Chatham village with the New York and Harlem and the Boston and Albany trains with safety to life; that by the purchase of considerable new rails and the rerolling of those that are bad, thus constantly renewing the rails, the road can be made safe, attain the speed requisite and largely increase its capacity for business, with increased earnings, with little increased expense of

operating the same; that the ties upon the road are all in a very bad condition and must be renewed as they can be procured when sufficient means to do it are provided. Very few have been put in for the past three years, and such as have been are of soft, poor timber, unfit to hold a spike, and are not substantial or durable; that most of the spikes are now held by rust and frozen condition of the ground; that the road has been washed in many places and needs new gravel; that as the frost comes out it has made the track very uneven and the poor condition of the ties makes it impossible to repair the road in these places; that the bridge at the Hoosick river has been damaged by the late freshet and will need to be extensively repaired or rebuilt in the spring, and those at Stephentown, Lebanon flats and Chatham, extensively repaired to make them safe; that the trestle near Brainard station needs repairing and strengthening in the spring; all these expenditures will be beyond the immediate earnings of the road to liquidate, but when due, will not only greatly enhance the value of the property to the bondholders by giving the road requisite, and to a great extent, permanent repairs absolutely required in order to operate the road with any degree of safety, but bring to it increased revenues from earnings that must ultimately bring a dividend to the bonds; that the short time your petitioner has operated the road has not been sufficient to fully arrange and organize all the resources of business.

Among these, if the road was in proper repairs so the trains
334 could make time and their connections with the New York and Harlem railroad, a large business in carrying milk would soon be made profitable; thus far its receipts have exceeded your petitioner's expectations or the representation made to your petitioner, and is in excess of expenses, which have been larger for the month last past than the average for the coming months will be, by reason of starting the road *de novo*, and surmounting the expenses of the winter months; your petitioner further shows, that from the knowledge he has been able to acquire of the earnings of the road before it was operated by Mr. Root, and the sources of business which appear to your petitioner to have been neglected instead of encouraged, your petitioner is fully of the opinion that the careful management and attention to the wants of the business interest of the people, it will accumulate as much business as can be comfortably done, and be made to clear itself of any temporary obligation incurred in putting it in a safe condition to do business successfully and economically.

Your petitioner further shows that there are several claims for the right of way which have not been adjusted or settled, the owners or occupants consenting to the occupancy and construction of the road before payment; that suits are now pending concerning some of them; that in your petitioner's opinion these suits should be settled, as your petitioner is advised by counsel that a successful defense cannot be maintained; that an early compromise and settlement of such as are in suit will be the most economical, and of the others an early settlement should be made to avoid costs and

prevent any interference with the present possession and operation of the road.

You- petitioner further shows that there are large arrears of taxes in the towns of Stephentown, Hoosick, Petersburgh and Berlin, for the year 1877, and the road in those towns was sold over a year since by the treasurer of Rensselaer county for taxes, and the
335 road must be redeemed from the sales or the bondholders or other owners of the road will loose the right of way and railroad franchises.

Your petitioner further shows there are many unsettled claims against the company which appear just and equitable, and your petitioner is informed suits have been commenced on some of them, and the delay in payment has been caused by the many changes in the occupants of this property incident to the repeated leasing consolidations and other disposition of the property. This condition of things has operated to leave these claims for your petitioner to dispose of, and your petitioner is of the opinion that they should be compromised and settled at an early date, under the authority to do so contained in the order of the court appointing your petitioner receiver, &c.

Your petitioner further shows that as yet the earnings of the road, although highly encouraging, are not likely during the winter months, with possible increased expenses on account of snow, to be much more than sufficient to meet the certificates of indebtedness already issued for the purchase of rolling stock, and other purposes, amounting to the sum of $25,000. Therefore to provide for the purchase of necessary iron or steel rails and superstructures, and for a settlement of what appears to be unavoidable indebtedness of the company now existing, your petitioner desires authority to issue certificates of indebtedness not to exceed a sum necessary to be used for the purchase of iron or steel rails and superstructures, and in the settlement of the outstanding indebtedness of the company and for no other purpose, and your petitioner believes that these certificates can be applied directly to the purpose set forth and given to the creditors, thereby not increasing in that respect the liability of the company, or of any company that may come after it for the reason the rights of all creditors are preserved unimpaired by statute, and can be enforced against any new company as if the debt had been incurred or contracted by it.

336 Your petitioner believes that inasmuch as the pending suits and claims will undoubtedly be pressed to judgment, and become a prior lien upon the property, and many of the creditors have been promised the bonds of the company, it is not likely the creditors in that position will accept a less security than they now possess. Therefore to facilitate an early and economical settlement of such claims, and to facilitate negotiations for the iron and steel rails, it is suggested that certificates with interest be issued solely for the purpose aforesaid, and be made a first lien upon the property unless sooner paid by the receiver from the earnings of the road after paying the certificates issued for rolling stock and other purposes, as provided by the order heretofore granted.

Wherefore your petitioner prays that the court may instruct him in the premises as to his duties, and direct him as to the best mode of protecting the franchise and property of the railroad and its bondholders or owners, and to adjust, pay and discharge the legal claims against the road, and your petitioner will ever pray, &c.

J. W. VAN VALKENBURGH, *Petitioner.*

EDWARD NEWCOMB,
Counsel for Receiver, Albany, N. Y.

STATE OF NEW YORK, }
Albany City and County, } ss:

John W. Van Valkenburgh, being duly sworn says: That he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

J. W. VAN VALKENBURGH.

Sworn to before me this 23d day of February, 1881.

[L. S.] W. W. BRINKERHOFF,
Notary Public, Albany County.

337 Supreme Court.

In the Matter of the Application of the Receiver of the Lebanon Springs Railroad Company.

SIRS: Take notice that upon the petition of the receiver herein, a copy of which is herewith served upon you, this court will be moved at the next special term thereof, to be held at the city hall in the city of Kingston, on the 5th day of March, 1881, at the opening of the court or as soon thereafter as counsel can be heard, for instruction of the court in the premises, as prayed for in the annexed petition.

Dated Albany, February 23d, 1881.

Yours, &c., EDWARD NEWCOMB,
Counsel for Receiver, Albany, N. Y.

To Hamilton Ward, attorney general of the State of New York; Messrs. McClellan & Brown, attorneys for plaintiff; P. W. Ostrander, attorney for R. C. Root, defendant, and F. W. Westbrook, attorney designated for notices of motion.

338 At a special term of the supreme court of the State of New York, held at the supreme court chambers in the city hall, in the city of Kingston and county of Ulster, on the 5th day of March, 1881.

Present: Hon. Theodoric R. Westbrook, justice.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, &c., Defendants.

On reading and filing the petition of J. W. Van Valkenburgh, Esq., receiver of the Lebanon Springs Railroad Company, duly verified on the 23d day of February, 1881, asking for instruction as to his duties and to protect the franchise and property of the bondholders and owners of said railroad, after hearing Edward Newcomb, of counsel for said receiver, and F. L. Westbrook, Esq., of counsel in opposition thereto, it is ordered that James H. Jones, Esq., of Kingston, N. Y., be and he hereby is appointed an expert to examine the rails, ties, bridges, road-bed, trestles, telegraph poles and all matters appertaining to the running of the Lebanon Springs railroad, to the end that he make a report to this court with all convenient speed of the true condition of said Lebanon Springs railroad as hereinbefore specified, with his opinion thereon as to what is necessary and requisite for the protection of said
339 property and safety and successful running said railroad. That said report be made to said receiver, and that said receiver serve said report, together with a detailed statement of moneys received and expended by him, with such other information as he may have in relation to said railroad. That said reports and papers be served on F. L. Westbrook, Esq., ten days prior to the date of said hearing on said report before this court.

Enter in Rensselaer county.

T. R. WESTBROOK.

At a special term of the supreme court of the State of New York, held at the city hall in the city of Kingston, on the 1st day of October, 1880.

Present: Hon. T. R. Westbrook, justice.

Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railroad Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

On reading and filing the complaint herein, duly verified, and the affidavit of Marvin Sackett on part of the plaintiff, and
340 the answer of Russell C. Root and The Harlem Extension South Coal Transportation Company, and the affidavit of said Root and P. W. Ostrander on the part of defendants, and after hearing H. W. McClellan for plaintiff, and E. Newcomb and P. W. Ostrander for defendants, and it thereby appearing to this court

that the real property, franchises and effects which were of the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, and the New York, Boston and Montreal Railroad Company within this State, have, by transfers thereof made, properly become the property of the plaintiff and others, first-mortgage bondholders of the Lebanon Springs Railroad Company, and that said property and franchises are allowed by parties assuming to act for the said bondholders, as set forth in the complaint or otherwise, to be left with one or more of the defendants or other person therein referred to, to be operated and used and worn out and suffered to deteriorate in value, and without providing in any way for compensation therefor to the owners thereof, or to any person, and it being desirable that the absolute ownership and right of possession of said franchises and property should be determined, and in the meantime that the same should be protected and preserved, and the income therefrom saved for the owners thereof, now, on due proof of the service of the notice of motion, and on motion of H. W. McClellan, of counsel for the plaintiff;

Ordered, that John W. Van Valkenburgh, of the city of Albany, in the county of Albany and State of New York, be and is hereby appointed receiver of all the rights and franchises, which were owned, held and possessed by the Lebanon Springs Railroad Company, or by any of the defendants herein, at any time of, in or to the several pieces or parcels of land constituting the track or roadway of a railroad extending and starting from the village of Chatham, in Columbia county, New York, and extending northerly and
341 easterly through the counties of Columbia and Rensselaer, to the eastern boundary of this State, in the town of Hoosick, in the said county of Rensselaer, together with all the rails, bridges, fences, stations, buildings and structures thereon, and of the estate and franchises of said company, and of all the powers, rights, privileges and authority thereto appertaining, of the rents, tolls and incomes, of the title deeds, leases, contracts and leased property, and of all the rights thereunder, wherever any or all of said property may be situated, collected, exercised or enjoyed, whether in the State of New York or also in the State of Vermont, so far as the laws of that State will allow, and of all the books, papers and vouchers, including the book of minutes kept by the railroad company, and in use up to and at the time of the foreclosure sale of the railroad property.

All power and authority herein given to be held and exercised for the public convenience, and for the protection of those interested in said railroad and franchises.

And said receiver is also hereby authorized to run and operate said road, and for such purpose to employ such rolling stock as may be needed, to use and preserve said property in proper condition, to repair and renew all existing structures, and make all requisite additional structures as may be useful and proper for safe and effectual transportation on said railroad, and to do all proper acts and take all proper measures for protecting and securing the possession, use and enjoyment of what he shall or should receive hereunder, and

for promoting the business of said railroad; and he is hereby authorized to retain and employ all such persons, and to take such advice as may be reasonably needful and proper in and about the discharge of his duties under this order, and generally do or cause to be done in respect to the property, franchises, rights and contracts and of whatever else, of which he is appointed receiver, any and all things which, but for this order, might be or should
342 be done by said railroad as a company, or any one in its behalf, including the compromise and adjustment of all claims, and the direction and control of all suits and legal proceedings, now or to be pending by or against said railroad; and all attorneys and counsel now representing said railroad are required to act in the prosecution and defense of such suits and proceedings, under the direction of said receiver, and on his request to give place to others.

That the said receiver is authorized to institute such suits and proceedings in this State and elsewhere, as in his judgment and by the advice of counsel shall be deemed proper and for the advantage of the property and rights to him committed, and to pay the proper expenses of the same, and also any judgment that may be recovered against him as such receiver, in any suit, and to defend all suits and proceedings affecting his receivership; to pay all legal expenses attending his appointment as receiver, and in all cases in which he has any reasonable doubt as to his duty to apply to this court in this suit for instructions.

Said receiver is hereby authorized, upon taking possession as receiver, to at once enter upon and take possession of all stations, apartments and offices of, or occupied by said railroad, and of the contents thereof, of all the property, premises, erections, and whatever is thereon belonging to said railroad, or of which it has any right of possession or control, whether the same be held by lease or otherwise, and of everything of which he is appointed receiver; to require of its agents and employés, or any person or persons in possession, a delivery and surrender to him of whatever they, or either of them, have or hold by virtue of their relations to said railroad, or belonging thereto; and that said receiver may take all proper proceedings for the recovery of the same in whatever States it may be necessary to proceed; and it is further ordered that the said receiver, acting under and in pursuance of this order, and in
343 good faith and with ordinary care and prudence, shall not be individually liable for any breach of, or upon any contract entered into, by him as such receiver, or for any injury to person or property, or for the faults or negligence of his subordinates, or for any loss, damages or liabilities not occasioned by his own gross neglect or willful misconduct; and it is further ordered that said receiver do cause to be ascertained, prepared, as near as he may be able to do, and file a statement of the bonds of said railroad and who owns and holds the same; that said receiver do prepare and file a statement, to be verified by him, of all moneys and funds which he shall receive upon entering upon the discharge of his trust as receiver; that said receiver do cause to be prepared and filed a general sched-

ile of the rolling stock, specifying the amount of each kind, and generally of the supplies, fuel and material, furniture and other miscellaneous personal property of said railroad which he may receive as receiver.

And it is further ordered that any moneys received by him as such receiver, beyond any amount needed for his payments, be kept by him on deposit in some suitable bank or banks, to his order as receiver.

And it is further ordered that said receiver execute his bond to the people of this State in the penalty of $5,000, conditioned for the faithful performance of his duty as receiver herein, with at least two sufficient sureties, freeholders in this State, to be approved as to form and sufficient security by a justice of this court, and to be filed in the office of the county of Rensselaer before entering upon the discharge of his duties as such receiver.

And it is further ordered that the defendants in this action and each and every one of them, and all persons do refrain from interfering with or obstructing such receiver, or his possession or
344 use of said offices, premises, franchises and property, and in taking possession of the same.

Enter in Rensselaer county.

T. R. WESTBROOK,
Justice Supreme Court.

Filed October 7, 1880.

JAMES KEENAN, *Clerk.*

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I hereby certify that I have compared the annexed copy of order with the original thereof, filed in this office on the 7th day of October, 1880, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand
[L. S.] and affixed my official seal this 7th day of October, 1880.

October, 1880.

JAMES KEENAN, *Clerk.*

345 Supreme Court, County of Rensselaer.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I do hereby certify that the security required by the order of this court, made on the 1st day of October, 1880, in the above action, to be given by John W. Van Valkenburgh, receiver therein, has been

acknowledged and filed in my office agreeably to the order of this court and duly approved by Hon. C. R. Ingalls, one of the justices of said court.

Dated Troy, October 11, 1880.

[L. S.] JAMES KEENAN, *Clerk.*

346 Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

To the receiver of the Lebanon Springs railroad:

In pursuance and by virtue of an order in this action, made at a special term of the supreme court chambers, in the city of Kingston and county of Ulster, on the 5th day of March, 1881, by the Hon. Theodoric R. Westbrook, one of the justices of our said court, and duly entered in the office of the clerk of Rensselaer county on the 7th day of March, 1881, by which it was ordered, among other things, that the subscriber, James H. Jones, of Kingston, N. Y., be and thereby was appointed an expert to examine the rails, ties, bridges, road-bed, trestles, telegraph poles, and all matters appertaining to the running of the Lebanon Springs railroad, to the end that he make a report to this court with all convenient speed of the true condition of said Lebanon Springs railroad in the particulars above specified, with his opinion thereon as to what is necessary and requisite for the protection of said property and the safety and successful running of said railroad.

And that said report be made to the receiver of said railroad.

I, the subscriber, James H. Jones, expert appointed as aforesaid, residing in the city of Kingston, Ulster county, N. Y., do
347 respectfully certify and report that having been served with a certified copy of the above-mentioned order, I made a general and specific examination of said Lebanon Springs railroad, its rails, ties, bridges, road-bed, trestles, telegraph poles, and all matters appertaining to the running and management thereof.

Rails.—I found the rails of said road of iron and worn to such an extent as to render the running of trains over them, even at ordinary rate of speed, extremely dangerous.

For the safety of travel over the said road I would respectfully recommend the removal of the poorer rails, and the replacing of new ones at an early date, that accidents of serious nature might be avoided.

To render the track safe for ordinary use would require from 2,500 tons, to 3,000 tons of new rails to replace the poorer conditioned of the old ones.

If the new rails be of iron the cost would be at mill $47.50 per ton, or for 3,000 tons, $142,500. If the new rails be of steel the cost would be at mill $62 per ton, or for 3,000 tons, $187,000.

Ties.—I found the ties badly decayed. To replace the poorer conditioned ties by new ones would require 1,500 ties to the mile, for

the purpose of rendering the road safe for operation. There are fifty-eight miles of road-bed which requires such new ties immediately, in all about 87,000 new ties. Such ties (chestnut and oak) would cost delivered along the line of road forty cents each, or for 87,000 ties, $34,800.

Road-bed.—The road will require new ballasting, and for this purpose new material will be necessary. The ditches throughout the entire length of the road should be cleared out, at a cost of about in the aggregate of $5,000 to $8,000, the latter and larger sum could be laid out for such purpose with much profit to the road-bed—even if the work be done in the most economical manner.

Bridges and trestles.—I found the bridges and trestles in an unsafe condition, all needing repair.

348 Chatham bridge is 241 feet in length. The timbers are in a poor condition, and are for the larger part badly decayed.

Brainard's trestle is 700 feet in length. The timbers in this structure seem to have suffered the most from use and the action of the elements. I would report it unsafe for anything but the lightest travel.

Adam's bridge is 150 feet in length, and the timbers are badly decayed, and ought to be repaired at an early date to save its usefulness.

Stephentown bridge is 140 feet in length. The timbers are rotten. I consider this bridge unsafe.

Hoosick Junction bridge is 256 feet in length. The timbers are decayed badly. I consider this bridge unsafe also.

To repair or rebuild these bridges and trestles will cost from $12,000 to $15,000.

Abutments to bridges.—The long absence of necessary repairs to the abutments will require an outlay in mason-work of about $4,000.

Telegraph poles.—The telegraph poles need renewing. This will require thirty-five new poles to the mile for fifty-eight miles, or 2,030 new poles at fifty cents each = $1,015. This cost does not include the cost of setting nor attaching the wire.

Rolling stock.—I found the three locomotives and three coaches purchased by the receiver in good running order.

And I do further report that, from what experience I have had in the construction and repairs of railways, I would estimate the expenses for relaying the ties, rails, the maintenance and running of a construction train; for fish-plates, bolts, nuts and spikes to be used for such purpose; the setting telegraph poles and attaching wires to the same, on this line of road, would amount to the sum of $70,000.

Management.—The management, from personal observation and from information obtained from other sources, seemed to be

349 operated economically and with the desire to make the best financial return from the means at its disposal.

As a summary of the foregoing part of my report, I would add that, to put the Lebanon Springs railroad in a condition to render its operation safe and successful, would require—

New rails, if iron, $142,500; if steel—these would be the cheaper because of duration of time they may be used.	$187,000
New ties	34,800
Repairs to road-bed, say, in any event	8,000
Bridges and trestles	15,000
Mason-work on abutments	4,000
Telegraph poles	1,015
Labor.—Maintenance of construction train and material used in relaying track, the resetting of telegraph poles and attaching wire	70,000
	$319,815

This sum might be decreased by the use of iron rails, still, we would have to add the cost of transportation of rails, which would bring the amount up to nearly the sum of $280,000 or $290,000, with a small working surplus.

All of which is respectfully submitted.

Dated March 19th, 1881.

JAMES H. JONES.

350 RENSSELAER COUNTY, *ss:*

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

ALBANY COUNTY, *ss:*

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD COMPANY, Defendant.

To the supreme court of the State of New York:

Your petitioner, John W. Van Valkenburgh, respectfully shows that he was appointed receiver of the Lebanon Springs Railroad Company by this court on the 4th day of December, 1880, and filed his bond as required by the order of this court with the clerk of Albany county, in second above entitled action.

That, as required by statute, your petitioner published a
351 notice of his appointment as receiver, requiring all persons having claims against said railroad company to be filed with your petitioner.

That claims have been so filed with your petitioner for land damages and other claims against said road.

That other claims, as your petitioner is informed and believes, exist against said road for the right of way, which are now in suit, wherein the plaintiffs demand the ejectment of said railroad company from said lands.

That said claims, as near as your petitioner can ascertain the same, amount in the aggregate to the sum of about $8,000; the said claims are in such an unsettled state as to the amounts legally and rightfully due, that your petitioner is unable to arrive at the same, and desires that the same be referred to a suitable referee to ascertain and determine the amounts thereof.

That on the appointment of your petitioner as receiver in the first above entitled action, he became possessed of said railroad on the eleventh day of October, and took the management of the same on the 20th day of October, 1880.

That your petitioner found the road-bed, rails, depots, bridges and structures in a damaged and dangerous condition, and the said road without motive power, and without any rolling stock, either passenger, baggage or freight cars, hand, dump or rubble cars.

That no tools of any kind, neither machinery of any kind, was found thereon.

That your petitioner applied to the supreme court for instructions in the premises on this state of facts.

That said court directed your petitioner to issue $25,000 in certificates for the purpose of equipping and running said road.

That on the 28th of October, 1880, your petitioner ran the first train over said road.

That your petitioner negotiated part of said $25,000 of certificates, and used the proceeds thereof in the purchase of rolling stock, motive power, tools and necessary equipments for the use
352 thereof, and spent portions of said funds in the making of absolutely necessary repairs of said road upon the most dangerous portions thereof.

That Schedule "A" hereto annexed, is a statement of the amounts of moneys received from said certificates, also of the earnings of said road, together with the disbursements of the funds so as aforesaid received.

JOHN W. VAN VALKENBURGH, *Petitioner.*

STATE OF NEW YORK,
Albany City and County, } ss.:

John W. Van Valkenburgh, being duly sworn, says that he is the petitioner above named; that the said petition and the Schedule "A" thereto annexed, is true of his own knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters he believes it to be true.

JOHN W. VAN VALKENBURGH.

Sworn to before me this 22d day of March, 1881.

W. W. BRINKERHOFF,
[NOTARIAL SEAL.] *Notary Public, Albany County.*

353 SCHEDULE "A."

Report of Receipts and Disbursements to and Including March 18th, 1881.

Receipts.

From receiver's certificates negotiated (issue limited to $25,000)	$19,675 00
From all agents on passenger and freight business, and from conductors	24,794 01
From National Express Company	254 16
From railroad companies on joint passenger and freight account	144 39
From other sources	562 67
From P. O. Department	598 62
Total receipts	$46,028 85

Disbursements.

For receiver's certificates, matured	$6,000 00
For interest on certificates, matured	113 00
For station agents to pay advance charges for connecting roads	5,562 60
For N. Y. C. & H. R. R. R. Co., account for two locomotives and three coaches	4,500 00
For Delaware and Hudson Canal Co., one locomotive	3,500 00
For repairs to engines and coaches	1,470 01
For hand and rubble cars	348 75
For repairs of road-bed, including cost of new ties and laying same in November; turn-table, new station building, repairs of station and water-tank, coal, platforms, etc.	2,541 79
For stationary, general office and all stations, furniture, etc.	923 31
For pay-rolls from October 28th, 1880, to February 28th, 1881, inclusive	13,537 68
354 For wood and coal for engines and stations	3,679 34
For rentals, depot privileges N. Y. & H. R. R. R. Co., etc.	820 00
For taxes	69 41
For assorted iron rails to be used in repairs	330 00
For attorneys' fees	250 00
For legal expenses of maintaining receiver's rights to property of road in State of Vermont	200 00
For steel frogs and crossings for T. & B. R. R. crossing at Petersburgh junction	443 19

For other items generally classified under head of contingencies, including general office expenses, advertising, traveling expenses, etc.	708 73
Cash on hand	1,031 04
	$46,028 85
Balance cash on hand	$1,031 04

Earnings.

	November.	December.	January.	February.	Total.
Pass'ger	$939 15	$896 45	$788 89	$750 00	$3,374 49
Freight	3,412 84	3,649 16	3,764 07	4,603 59	15,428 65
Express	66 66	60 00	65 00	62 50	254 16
Mail	250 00	240 00	342 62	234 00	1,066 52
Total	*$4,668 65	$4,845 61	$4,960 58	$5,650 08	$20,124 92

*Including three days of October, 1880.

The earnings for the first two weeks in March, 1881, show a decided increase over the corresponding period of time in the month of February, 1881. The earnings for the month of March, unless there should be an unusual dropping off of business or the road should be damaged by some serious accident, will probably be not far from $6,300—possibly in excess of that amount, as against
355 $4,845.61 in the month of December, 1880. This increase is owing to the fact that during the month of March there have been three engines in fair order and all at work, while in the previous month the motive power was so impaired that there was one engine in shop for repairs all the time, and only one engine that could be depended upon for work.

As shown by above statement of earnings, the total for month of November, 1880, includes three days in October in which the earnings amount to about $400. So that the earnings for the month of December exceed those of November to the amount of about $600.

RENSSELAER COUNTY, *ss:*

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

356 ALBANY COUNTY, *ss:*

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD COMPANY, Defendant.

To F. L. Westbrook, Esq., counsel named in the order, upon whom notice of all proceedings on behalf of said receiver should be served:

Take notice that upon the further hearing of the motion made by the receiver on his petition, verified February 23d, 1881, for the relief and instructions therein prayed for, which stood over as directed in the order of March 5th, 1881, said petitioner will read the supplemental petition, Schedule "A," thereto annexed; the report of James H. Jones, Esq., the expert therein appointed; and the order appointing said petitioner receiver of said railroad company, copy of which has hereto or *are* herewith served upon you.

That said further hearing will be brought on at a special term of this court, to be held at the city hall in the city of Kingston on the 2d day of April, 1881, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for the instructions and relief prayed for in said petition and supplemental petition therein.

Albany, March 21st, 1881.

EDW. NEWCOMB,
Counsel for said Receiver, 89 State Street, Albany.

357 At a special term of the supreme court of the State of New York, held at the supreme court chambers, in the city hall, in the city of Kingston and county of Ulster, on the 2d day of April, 1881.

Present: Hon. T. R. Westbrook, justice.

RENSSELAER COUNTY, *ss:*

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

On reading and filing the petition of John W. Van Valkenburgh, Esq., receiver of the Lebanon Springs Railroad Company, verified the 23d day of February, 1881, the order made thereon under date

of March 5th, 1881, appointing James H. Jones, Esq., an expert, to examine the condition of said Lebanon Springs railroad, and to report thereon to the court; the report of said James H. Jones, Esq., to the court, dated March 19th, 1881; the orders appointing the receiver herein, dated October 1st, 1880, and December 4th, 1880, in the case of the People of the State of New York against said railroad; the supplemental petition of said receiver and Schedule "A" thereto annexed, verified March 22d, 1881; the notice of motion returnable this day and term, with due admission of service thereon; and it appearing from said papers that the said railroad is
358 out of repair, and said James H. Jones, in his report, recommends this court to instruct the receiver thereof to put the same in repair as to tracks, ties, bridges, telegraph poles, culverts and road-bed, and after hearing Mr. Edward Newcomb, counsel for said receiver, and Robert E. Andrews, associate counsel for said motion, and no one appearing in opposition thereto, and after mature deliberation thereon, it is—

Ordered, that John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, be and he is hereby authorized and directed to issue, under his hand, receiver's certificates of indebtedness, dated April 2d, 1881, with interest at six per cent., at five hundred dollars each, payable in five years, with interest. Coupons thereto attached, payable on the first day of January and July in each year, in the aggregate amount of three hundred and fifty thousand dollars. Said certificates to be signed by said John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, consecutively numbered from one to seven hundred inclusive; and a certificate on each thereof duly signed by one of the officers of the Farmers' Loan and Trust Company of New York City.

That said certificates are of the series included in the numbers and amount aforesaid.

That said certificates and the interest coupons thereto attached be made payable at said Farmers' Loan and Trust Company in said city of New York.

It is further ordered, that said receiver negotiate said certificates to the amount aforesaid, and with the money arising therefrom, said receiver is directed:

First. To pay and discharge the twenty-five thousand dollars of certificates heretofore authorized by an order of this court, dated the 25th day of October, 1880, and duly cancel said twenty-five thousand dollars of certificates and the interest thereon; and upon said
359 cancellation of said certificates, that said order of the 25th day of October, 1880, be and the same is hereby vacated, and said receiver's right to the issuing of additional, or any part of said twenty-five thousand dollars of certicates, as under and by said order directed, is canceled, and he is hereby forbidden to issue any more, or any part thereof.

Second. The said receiver is hereby empowered and directed, from the moneys arising from said certificates herein authorized to be issued, to purchase all necessary materials for the repairs of said

road, and pay and discharge all necessary expenses incident to the repairs thereof, with all other expenses attending the running and successful managing and operating of said railroad, as by the order appointing him receiver herein provides, together with such indebtedness as may be found due to claimants by the referee herein named; and for said purpose it is further ordered that Hon. Smith Strait, county judge of Rensselaer county, be and he hereby is appointed referee to hear and determine all existing claims against said Lebanon Springs Railroad Company, now filed or hereafter to be filed with said receiver.

It is further ordered, directed and decreed that said receiver's certificates of indebtedness to the amount herein directed to be issued, be and the same are hereby declared to be a debt of the receiver incurred for the benefit and protection of the said Lebanon Springs railroad and its owners, and bondholders thereof, which certificates to the amount herein specified, viz., three hundred and fifty thousand dollars, are declared and decreed to be a first lien on said railroad bed, track, ties, bridges, trestles, culverts, engines, cars, depots, and all and every kind of property, either owned by said railroad company, or in the possession of the receiver thereof; and are to be recognized as such in any reorganization of the company, or in its consolidation with any other company; and in case
360 of any sale of the said railroad, the property in hands of the receiver, and franchises, under any decree of the supreme court, these certificates are to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and canceled by him from the earnings of the said railroad.

But in case said railroad, and property in hands of the receiver, and franchises, on any sale thereof, does not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates hereinbefore authorized to be issued, then the purchaser of said railroad, and property in the hands of the receiver, and franchises, assumes as a first lien thereon so much thereof as at that time remains outstanding and unpaid, with the interest thereon.

Enter in Rensselaer county.

T. R. WESTBROOK,
Justice Supreme Court.

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I hereby certify that I have compared the annexed copy of order with the original thereof filed in this office on the 4th day of April, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 4th day of April, 1881.

[L. S.] JAMES KEENAN, *Clerk.*

361 Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

To the supreme court:

The petition of Marvin Sackett respectfully shows to the court:

That he is plaintiff in the above-entitled action in behalf of himself and other bondholders of the Lebanon Springs Railroad Company against Rus- C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, as defendants.

That as such plaintiffs your petitioner was obliged to collect, classify and arrange all the complication of facts and place them in the hands of his counsel for the purposes of preparation to bring the said action. That the numerous interests involved, the extraordinary complications growing out of several sales and transfers of the property involved in the proceedings herein, and agreements between the several parties thereto, and the death of persons conversant with these several sales, transfers and agreements and other details, as well as the course and conduct of the persons intrusted with the care and management of the said property, has made it extremely difficult to arrive at a correct and connected knowledge of what had been done, so as to properly and safely prepare the complaint in the action and for detailed proof of the same, and made it necessary to confer with numerous bondholders in New York and other places,

362 and has caused divers and repeated journeys to New York, Hudson, Albany and Troy in New York; and Bennington, Rutland and Montpelier, in Vermont, for that purpose; and also to examine the records of Columbia and Rensselaer counties, and of Bennington and Montpelier, in Vermont, to procure copies of the deeds, mortgages, decrees and other papers important in the case, as well as to confer with counsel both in New York and Vermont, in preparing the said facts to be alleged in the said complaint in this action, and in procuring proper evidence upon which to base the same.

That in the months of July, August, September and October last he expended and caused to be expended in the aforesaid ways, as well as in copying papers and preparing exhibits in printing and in the telegraphs and in hand, the sum of $796.80.

That the trial of this case and preparation for the same will involve a further expenditure of money in procuring attendance of witnesses, expenses of the term and other necessary disbursements of at least $500.

Your petitioner further shows that H. W. McClellan, Esq., of Chatham, N. Y., is one of your petitioner's counsel in said action; that he has, to the knowledge of your petitioner, had the greater portion of his time occupied in the matters of fact and law arising out of and incident to the litigation in regard to the said railroad

company and parties interested therein; that said action has been and is now being prosecuted in the interest and for the protection of the bondholders of said road; that the many individuals owning the same causes a large correspondence and much time in consultation as well as examination of facts and of law; that your petitioner's counsel and attorneys have not as yet been paid anything whatever on account; that such service and labor of each are and have been of great value to the bondholders; that your petitioner desires that his said counsel and attorneys be paid some
363 proper and fair allowance out of the money in the hands of the receiver on account of services rendered up to this time in said action.

And your petitioner will ever pray, &c.

MARVIN SACKETT.

Dated April 20, 1881.

COLUMBIA COUNTY, *ss*:

Marvin Sackett, being duly sworn, says: That the foregoing petition by him subscribed is in all respects true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

MARVIN SACKETT.

Sworn to before me this 20th day of April, 1881.

GEORGE McCLELLAN,
Notary Public.

364 Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

Take notice that upon the petition, a copy of which is herewith served, we shall move this court at a special term of the supreme court, to be held at the court-house in the city of Hudson, on the 28th day of April, 1881, at 7 o'clock p. m., for an order directing the receiver herein appointed to pay the disbursements set forth in the petition herein, and for an allowance to the attorneys on account for services rendered, and preparation for trial of this action and for such further and other order as shall be just.

Chatham, April 20th, 1881.

To J. W. Van Valkenburgh, receiver; McClellan & Brown, plaintiff's attorneys, and Hon. H. Ward, att'y gen'l of New York State.

365 At a special term of the supreme court of the State of New York, held at the court-house in the city of Hudson, on the 28th day of April, 1881.

Present: Hon. T. R. Westbrook, justice.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

On reading and filing the petition of Marvin Sackett, plaintiff in this action, and notice of motion for this day, and proof of due service of said petition and notice of motion on the attorney general of the State, and counsel for the receiver herein, the said petition praying that the said receiver pay to the plaintiff herein the moneys disbursed by him in preparation, bringing and in so far conducting the action, and for a further sum for the further preparation, and in subpœnaing the witnesses for the trial, and for an allowance to his counsel and attorneys herein, after hearing H. W. McClellan for said motion, and E. Newcomb, Esq., counsel for the receiver, in opposition thereto, it is ordered, that John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company, appointed herein, out of the first moneys by him received, pay to the plaintiff herein the sum of $796.80, moneys as appears by said petition to have been expended by him, and to Messrs. McClellan & Brown, plaintiff's attorneys herein, the sum of $1,200 on account of allowance in the interlocutory judgment of the appointment of a receiver herein.

Enter in Rensselaer county.

T. R. WESTBROOK,
Jus. Sup. Court.

366 Supreme Court.

In the Matter of the Receivership of JOHN W. VAN VALKENBURGH of the Lebanon Springs Railroad Company.

SIR: Take notice that upon a petition, a copy of which is herewith served upon you, this court will be moved at a special term thereof, to be held at the supreme court chambers, in the city of Kingston, N. Y., on the 21st day of May, 1881, at the opening of the court, or as soon thereafter as counsel can be heard, that the prayer of the said petitioner be granted, or for such further order or relief as the court may grant in the premises.

Dated May 19th, 1881.

Yours, etc.,

R. E. ANDREWS,
Petitioner in Person.

Office and post-office address, Hudson, N. Y.

To Mr. John W. Van Valkenburgh, receiver, etc.

367 Supreme Court.

In the Matter of the Receivership of JOHN W. VAN VALKENBURGH of the Lebanon Springs Railroad Company.

To the supreme court of the State of New York:

The petition of R. E. Andrews, of Hudson, N. Y., respectfully shows: That the said John W. Van Valkenburgh is the receiver of

the said railroad company, and is such receiver in two actions in this court, in one of which Marvin Sackett is the plaintiff and Russell C. Root and another are defendants, and in the other of which The People of this State are plaintiffs and the said railroad company is defendant. That the said R. E. Andrews is an attorney and counselor at law of this court, and since the appointment of said receiver has rendered divers services for and at the request of the said receiver of considerable value, and as such counsel disbursed divers sums of money on account of which he has received but the sum of one hundred dollars, and upon which services and disbursements a considerable amount still remains due and unpaid.

Your petitioner, therefore, prays that this court will take such proceedings for the ascertainment and payment of the amount so due and unpaid as may be meet and proper, and grant such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

Dated Hudson, N. Y., May 18th, 1881.

R. E. ANDREWS.

368 COLUMBIA COUNTY, *ss:*

R. E. Andrews, being duly sworn, says that he has heard read the foregoing petition and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

R. E. ANDREWS.

Sworn to before me this 18th day of May, 1881.

SAMUEL EDWARDS,
Commissioner of Deeds, Hudson, N. Y.

John W. Valkenburgh, Esq., receiver of Lebanon Springs Railroad Company, to Robert E. Andrews, as counsel, Dr.

1880.

November 19. To attending at Albany in conference with receivers and lawyers.

December 10. To attending and arguing two motions at Kingston special term for relief affecting the receiver by making other persons, parties, etc., and previous preparations therefor.

1881.

February 22. To attending at Albany to meet Mr. Dunton, of Vermont, in relation to the foreclosure action commenced against Park & Duncan on the $5,000,000 mortgage upon said railroad.

February 24. Received telegram from receiver and met H. W. McClellan for conference.

February 25, 26, 27. To attending at New York city, in conference with Mr. Dunton, Mr. Edward Newcomb, A. J. Vanderpoel and receiver, in respect to said $5,000,000 mortgage foreclosure and other matters relating to the receivership.

April 2. To attending before special term of supreme court, at

Kingston, on motion for leave to issue bonds for repairs of said railroad, etc., and previous preparation for said motion

369 April 21. To going to and attending at Albany in reference to the receivership.

May 3. To attending before committee of the New York senate to oppose proposed bill affecting the receivership and apparently proposed for his particular case, and previous preparation therefor. To personal expenses attending the rendering of the above services. To other services and advice pending the receivership not capable of convenient itemizing.

Cr.	$1,000
By cash	100
	$900

At a special term of the supreme court of the State of New York, held at the city of Albany, on the 20th day of May, A. D. 1881.

Present: Hon. T. R. Westbrook, justice.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Another, Defendants.

On reading petition of R. E. Andrews, verified May 18th, 1881, and proof of service of notice of this application upon the attorney general of this State, and E. Newcomb, Esq., counsel for said

370 receiver, after hearing R. E. Andrews in favor of the application, and E. Newcomb for the receiver, and attorney general, in opposition thereto, and it appearing upon such hearing that there is due and owing from said John W. Van Valkenburgh, as such receiver, to said R. E. Andrews, the sum of nine hundred ($900) dollars, for his service and disbursements as counsel for such receiver, it is ordered that the said Van Valkenburgh as such receiver pay to the said R. E. Andrews, on demand, out of any moneys that now may be or may hereafter come into his hands as such receiver, the said sum of nine hundred dollars, and take his receipt for the same, which shall be his sufficient voucher for the payment and allowance thereof.

JAMES KEENAN, *Clerk.*

To the supreme court of the State of New York:

Your petitioner, John W. Van Valkenburgh, respectfully shows that on the 1st day of October, 1880, — was appointed receiver of the Lebanon Springs Railroad Company, in an action in the supreme court, wherein Marvin Sackett was plaintiff and Russell C. Root and others were defendants.

That as such receiver, your petitioner duly filed his bond, duly approved by one of the justices of this court, with the clerk of Rensselaer county on the 11th day of October, 1880.

That at the time of the qualification of your petitioner as receiver, aforesaid, said railroad was in the possession of the defendant Root, and by him run with motive power said to belong to him or others.

That on or about the 1st day of November, 1880, your petitioner found said railroad entirely stripped of all motive power and running stock, and nothing left of said railroad but the track-bed, bridges, depots, etc.

371 That your petitioner immediately devoted his entire energies to put said road in running order.

That from time to time your petitioner has added to said road the running stock, locomotives and cars, until now said road is in possession of five locomotives, five passenger cars and one baggage car.

That the income of said railroad, at the end of the first month after your petitioner took possession of same, was $4,400.

That by the constant attention and looking after freight from adjoining roads, your petitioner has increased the monthly income of said road until the month of May the income of said road was $8,000.

That said railroad is fifty-eight miles in length and has seventeen different stations.

That the superintendence of said railroad in all its details devolves upon your petitioner.

That your petitioner's time is constantly occupied in the running of said road and cannot engage in any other business or vocation.

That your petitioner has been engaged in railroads from conductor to superintendent, for the last thirty-two years, and as such has great experience in the management of railroads in all branches of the business.

Wherefore, your petitioner prays that this court may fix an adequate compensation per month for the services of your petitioner as superintendent of said railroad, in addition to the compensation now allowed by law to receivers, and that this court may make and grant an order herein, fixing the compensation of your petitioner herein, and your petitioner will ever pray, etc.

J. W. VAN VALKENBURGH, *Petitioner.*

372 STATE OF NEW YORK, }
Albany City and County, } *ss.:*

John W. Van Valkenburgh, being duly sworn, says: He is the above-named petitioner; that the foregoing petition is true to the knowledge of petitioner, except as to the matters therein stated on information and belief, and as to these matters he believes it to be true.

J. W. VAN VALKENBURGH.

Sworn to before me this 6th day of June, 1881.

W. W. BRINKERHOFF,
Notary Public, Albany County.

At a special term of the supreme court, held at the supreme court chambers, in the city hall, in the city of Kingston and county of Ulster, on the 7th day of June, 1881.

Present: Hon. Theodoric R. Westbrook, justice.

Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

Upon reading and filing the petition of John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company,
373 asking that his compensation as receiver be fixed by this court and he be allowed to draw the same as so fixed from time to time, and after hearing Edward Newcomb, of counsel for said receiver, it is ordered that said John W. Van Valkenburgh, Esq., receiver of the Lebanon Springs Railroad Company, be and he is hereby allowed the sum of five per centum upon the sums received and disbursed by him, as a commission and for his compensation, in addition to his lawful expenses as receiver as aforesaid, until the further order of the court; and said receiver is hereby authorized to draw from time to time an amount not exceeding said sum hereby fixed from the funds in his hands as receiver.

Enter in Rensselaer county.

T. R. WESTBROOK.

Supreme Court, Rensselaer County.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

To the supreme court of the State of New York:

The undersigned, appointed by an order of the court, bearing date the 2d day of April, 1881, as referee to hear and determine all existing claims against said Lebanon Springs Railroad Company, and on the 1st day of June, 1881, one Sylvanus Carpenter appeared in person before me at a reference at my office in the city of Troy, N. Y., and the said Lebanon Springs Railroad Company,
374 through its receiver, John W. Van Valkenburgh, appeared by Edward Newcomb, his attorney, and after having considered the proofs and allegations of the parties as to the alleged claim of Sylvanus Carpenter against the said "Lebanon Springs Railroad Company," reports thereon to the court as follows:

I find as matter of fact:

First. That the said Sylvanus Carpenter, between the 5th day of August, 1867, and the latter part of the year 1873, rendered and performed services at the special instance and request of the said Lebanon Springs Railroad Company; the reasonable value thereof actually amounts to the sum of $408.75, and that no part of the same has been paid thereon, except the sum of fifty dollars.

I find as a matter of law that the said The Lebanon Springs Railroad Company is indebted to the said Sylvanus Carpenter for the balance due on said services in the sum of $358.75, for which said sum the said Sylvanus Carpenter is entitled to judgment against the Lebanon Springs Railroad Company.

Dated June 28th, 1881.

E. SMITH STRAIT, *Referee.*

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

The matters of the claims of parties against the Lebanon Springs Railroad Company having been referred to the Hon. E. Smith
375 Strait to hear and determine the same, and his report upon the claim of Sylvanus Carpenter against said Lebanon Springs Railroad Company having been filed, whereby he finds to be due from the Lebanon Springs Railroad Company to the said Sylvanus Carpenter the sum of $358.75.

Now, on motion of McClellan & Brown, attorneys for said Sylvanus Carpenter, it is adjudged that said Sylvanus Carpenter do recover of said Lebanon Springs Railroad Company the said sum of $358.75.

Dated June 30th, 1881.

JAMES KEENAN, *Clerk.*

Supreme Court, Rensselaer County.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

To the supreme court of the State of New York:

The undersigned, appointed by an order of this court bearing date the 2d day of April, 1881, in the above-entitled action, as referee to hear and determine all existing claims against the said The Lebanon Springs Railroad Company, respectfully reports that at a hearing of the said reference he has been attended by Mr. Edward Newcomb, attorney for John W. Van Valkenburgh, receiver of the said The Lebanon Springs Railroad Company, and by Marvin Sackett, a claimant against the said The Lebanon Springs Railroad
Company, and after hearing the proofs and allegations of the
376 said parties, I find as a matter of fact that between the 5th day of January, 1873, and the 1st day of December, 1875, the said Marvin Sackett, at the special instance and request of the said The Lebanon Springs Railroad Company, under a special contract at five dollars per day and his expenses to be paid, he performed work, labor and services and paid expenses and disbursements which were reasonably worth and amounted to the sum of $2,397.40, in pursuance of the contract of hiring and upon which he has been paid the sum of $175.06, leaving a balance due him of $2,222.34,

with interest thereon from the 1st day of December, 1875, to date, amounting to $777.70.

I find as a matter of law, that the said The Lebanon Springs Railroad Company is indebted to the said Marvin Sackett in the sum of $3,000.04 for the balance due on said services and disbursements, with the interest, for which said sum the said Marvin Sackett is entitled to judgment against the said The Lebanon Springs Railroad Company.

Dated June 28, 1881.

E. SMITH STRAIT, *Referee.*

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

The matter of the claim of parties against the Lebanon Springs Railroad Company having been referred to the Hon. E. Smith Strait to hear and determine the same, and his report upon the
377 claim of Marvin Sackett against the said Lebanon Springs Railroad Company having been filed, whereby he finds to be due from the said Lebanon Springs Railroad Company to the said Marvin Sackett the sum of $3,000.04.

Now, on motion of McClellan & Brown, attorneys for said Sackett, it is adjudged that said Marvin Sackett do recover of said Lebanon Springs Railroad Company the said sum of $3,000.04.

Dated June 30, 1881.

JAMES KEENAN, *Clerk.*

Supreme Court, Rensselaer County.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

To the supreme court of the State of New York:

The undersigned referee, appointed by order of this court, bearing date the 2d day of April, 1881, in the above-entitled action, to hear and determine all existing claims against the Lebanon Springs Railroad Company, respectfully reports that, at a hearing of the said reference, he has been attended by Edward Newcomb, attorney and of counsel for John W. Van Valkenburgh, receiver of the said Lebanon Springs Railroad Company, and by Wm. F. Taylor, claimant against the said Lebanon Springs Railroad Company, and
378 also by James Lansing, his attorney and counsel. And after hearing the proof of the parties, I find as a matter of fact:

Facts.

I. That said William F. Taylor is now, and has been since 1873, the owner of a certain farm situate in the village of Berlin, in the

town of Berlin, in said county, consisting originally of about 120 acres of land, and designated upon the hearing as the "Denison farm."

That the said Lebanon Springs Railroad Company occupies a portion of said farm for the purposes of its road, the portion so occupied is bounded and described as follows:

Beginning at the northwest corner of said parcel, in the south line of the lot formerly owned by Allen C. Streeter, in the west line of the railroad running along said Streeter's lot, and runs thence easterly along the south line of said lot four rods; thence southerly at the distance of two rods, easterly from the centre of the railroad in said parcel sixty-eight rods, to the farm of David Whitford; thence westerly along the line of said Whitford's farm, continued four rods; and thence northerly parallel with the second course, sixty-eight rods to the place of beginning, containing 222 square rods, or about one and three-quarters acres of land.

That the value of said parcel above described, together with the depreciation of the balance of said farm, by the use of the said parcel for the purposes of the railroad, is the sum of one thousand dollars ($1,000).

II. And I further find, that the said Wm. F. Taylor is the owner of another certain farm known upon the hearing herein as the "Bimmer farm," situated in said town of Berlin at one and one-half miles from said village, which originally consisted of about 109 acres of land.

That the said Lebanon Springs Railroad Company occu-
379 pies now, and for some time past has occupied, a portion of said farm for the purposes of its road and laying its tracks thereon; that the portion so occupied by said road is bounded and described as follows:

Beginning at the northwest corner of said parcel of land in a southerly line of A. C. Manchester's land, and runs thence easterly to the line of said Manchester's land continued four rods; thence southerly, and always at a distance of four rods from the centre of said railroad track on said parcel or farm, one hundred and twenty-three seven one-hundredths rods, to the lands of Alson G. Niles, thence westerly along said Niles's line continued, four rods; and thence northerly parallel with the second course one hundred and twenty-three seven one-hundredths rods, to the place of beginning, containing four hundred ninety-two twenty-eight one-hundredths rods of land.

That the value of said land so occupied by said railroad company, together with the depreciation of the balance of said farm, by the use of it by the said railroad company for the purposes of laying its tracks and operating its road, is the sum of fifteen hundred dollars.

Law.

I find as matter of law, that said William F. Taylor have judgment against the Lebanon Springs Railroad Company, the sum of twenty-five hundred dollars ($2,500), the value of the several parcels

of land above described, upon his executing and delivering to the said John W. Van Valkenburgh, as receiver, &c., a good and sufficient deed of the said several tracts or parcels of land, and that said Taylor convey the same by deed in fee-simple to said receiver upon said Taylor's receiving said $2,500.

E. SMITH STRAIT, *Referee.*

380 Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

The matter of the claims of parties against the Lebanon Springs Railroad Company having been referred to the Hon. E. Smith Strait to hear and determine the same, and his report upon the claims of William F. Taylor having been made and filed, whereby he finds that the said William F. Taylor have judgment against the Lebanon Springs Railroad Company in the sum of $2,500, the value of the several parcels of land described in the said report, upon the said Taylor's executing and delivering to John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, a good and sufficient deed of said several tracts or parcels of land; and that said Taylor convey the same by deed in fee-simple to said receiver, upon said Taylor's receiving said sum of $2,500.

Now, on motion of James Lansing, attorney for William F. Taylor, it is adjudged that the said William F. Taylor do recover of the said Lebanon Springs Railroad Company the sum of twenty-five hundred dollars ($2,500), the value of the said parcels of land in said report described, upon his executing and delivering to said John W. Van Valkenburgh, as receiver, &c., a good and sufficient deed of said several parcels of land; and that said Taylor convey the same by deed in fee-simple to said receiver, upon said Taylor's receiving said sum of $2,500.

JAMES KEENAN, *Clerk.*

381 Supreme Court, Rensselaer County.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

To the supreme court of the State of New York:

The undersigned, appointed by an order of this court, bearing date the 2d day of April, 1881, as referee, to hear and determine all existing claims against the said Lebanon Springs Railroad Company, do report: That on the 29th day of June, 1881, one Henry A. Tilden appeared in person before me, at a reference at my office, in the city of Troy, N. Y., and the said Lebanon Springs Railroad Company, through its receiver, John W. Van Valkenburgh, who appeared by Edward Newcomb, his attorney, and after having con-

sidered the proofs and allegations of the parties as to the alleged claim of Henry A. Tilden against the said Lebanon Springs Railroad Company, as follows:

I find as matter of fact that the said Henry A. Tilden, between the 14th day of November, 1867, and the 28th day of December, 1875, paid, laid out, advanced and expended to and for the use and benefit, and at the request of the Lebanon Springs Railroad Company, the sum of $98,248.39, which, with the interest on the various sums as so paid out and advanced, on the 1st day of January, 1876, amounted to the sum of $150,400.83, and upon which he has been paid by the Lebanon Springs Railroad Company, between the 14th day of November, 1867, and the 20th day of December, 1875, inclusive, the sum of $91,585.07, which, with the interest on
382 the various payments on the 1st day of January, 1876, amounted to the sum of $132,647.21, leaving a balance due him of $17,753.62, with interest thereon from the 1st day of January, 1876, to date, amounting to $6,213.75.

I find as matter of law that the said Lebanon Springs Railroad Company is indebted to the said Henry A. Tilden in the sum of $23,967.37 for the balance due on said payments and advances of money, with its interest, for which said sum the said Henry A. Tilden is entitled to judgment against the said Lebanon Springs Railroad Company.

Dated January 30, 1881.

E. SMITH STRAIT, *Referee.*

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

The matter of the claims of parties against the Lebanon Springs Railroad Company, having been referred to Hon. E. Smith Strait, to hear and determine the same, and his report upon the claim of Henry A. Tilden against the said Lebanon Springs Railroad Company having been filed, whereby he finds to be due from the Lebanon Springs Railroad Company to the said Henry A. Tilden, the sum of $23,967.37; now, on motion of McClellan & Brown, attorneys for said Tilden, it is adjudged that said Henry A. Tilden do recover of said Lebanon Springs Railroad Company the said sum of $23,967.37.

Dated July 5, 1881.

JAMES KEENAN, *Clerk.*

383 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD COMPANY, Defendant.

To the supreme court of the State of New York and the attorney general of the State of New York:

The undersigned, the receiver of the Lebanon Springs Railroad Company, respectfully reports for the quarter ending March 31, 1881:

That — this action, wherein Marvin Sackett is plaintiff, he was appointed receiver of the Lebanon Springs Railroad Company by an order of the supreme court dated October 1, 1880, and duly filed with the clerk of Rensselaer county.

That in the action wherein The People are the plaintiffs, he was duly appointed receiver of said railroad company by an order
384 of the supreme court dated the 4th day of December, 1880, and duly entered with the clerk of Albany county.

That under each of said orders the undersigned has duly qualified and is now in possession of said railroad, and is operating the same.

That the following is the report of the undersigned, as required by statute, as to receipts and disbursements for the quarter ending March 31st, 1881:

Cash Receipts.

Cash balance on hand January 1st, 1881		$2,133 27
Rec'd from station agents and conductors	$19,237 32	
Boston, Hoosac Tunnel and Western R'y	235 94	
N. Y. Central and H. R. R. R. Co.	1 25	
National Express Co.	187 50	
Rec'v'r's certificates	17,475 00	
Post-office Department	598 62	
Peterson & Packer	274 28	
J. W. Van Valkenburgh	290 10	
Other sources	18 23	
		38,318 24
		$40,451 51

Disbursements.

To station agents to pay advance charges to continuing roads		$3,112 60
Miscellaneous bills		3,394 92
Fuel		2,730 01
Rents		636 25
J. W. Van Valkenburgh		305 00
N. Y. C. & H. R. R. R. Co. on purchase of engines		1,500 00
Interest		326 00
Boston, Hoosac Tunnel and Western railway		10 51
385 Receiver's certificates		12,000 00
Boston and Albany railroad		152 48
Overcharges on freight		30 60
Painting passenger coaches		150 00
Engine-work		1,033 24
Iron rails		330 00
Hand and rubble cars		631 15
R. R. craning		363 81
Agents and employés in January, 1881		3,341 41
Agents and employés in February, 1881		3,598 16
Agents and employés in March, 1881		3,827 37
Balance		2,978 00
		$40,451 51
Cash on hand April 1st, 1881		2,978 00

Earnings.

	January.	February.	March.	Total.
Passenger	$786 84	$733 40	$1,119 84	$2,640 08
Freight	3,764 07	4,603 58	6,448 97	14,816 62
Express	62 50	62 50	62 50	187 50
Mail	240 00	240 00	229 14	709 14
Total	$4,853 41	$5,639 48	$7,860 45	$18,353 34
Total earnings for quarter ending March 31st, 1881				$18,353 34

Charges against Earnings.

Expense of maintaining road and real estate	$13,599 38
Fuel	2,659 00
Taxes	41 36
Oil and waste	244 49
Repairs of cars	781 27

Overcharge on freight	07
Interest	306 00
Balance	721 77
	$18,353 34
Balance of earnings applied on improvements	$721 77

386 *Balance-sheet.*

Assets.

Three locomotives and tenders, improved and in good order (cost)	$10,506 05
Three passenger coaches (cost)	4,267 70
Improvements and additions to road-bed, turnouts, &c.	5,673 45
Other improvements and station building, turn-table, &c.	1,686 23
Hand and rubble cars	660 65
Cash on hand	2,778 00
Paid J. W. Van Valkenburgh, account expenses, &c.	155 72
Amount due from agents and conductors	2,595 91
Amount due from National Express Co.	60 00
Amount due from P. O. Department	600 52
Amount due from railroad companies	38 30
Fuel and supplies, estimated	1,500 00
	$30,722 53

Liabilities.

Receiver's certificates		$14,675 00
New York Central and Hudson River Railroad Co.		3,000 00
Current bills and pay-rolls unpaid		8,477 23
Balance due railroad companies		139 45
Balance of earnings as above	$72,177 00	
Balance per last report	220,908 00	
Fuel and supplies on hand	1,500 00	
		4,430 85
		$30,722 53

J. W. VAN VALKENBURGH, *Receiver.*

387 ALBANY CITY AND COUNTY, *ss.:*

John W. Van Valkenburgh, being duly sworn, says that he is the receiver of the Lebanon Springs Railroad Company; that the foregoing report by him signed is in all respects correct and true; that all moneys received and disbursed by him and the sources of receipts, and the object and cause of disbursements thereof, are correctly and truly stated therein.

J. W. VAN VALKENBURGH, *Receiver.*

Sworn to before me this 7th day of May, 1881.

W. W. BRINCKERHOFF,
Notary Public, Albany County.

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others, Defendants.

388 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD.

To the supreme court of the State of New York and the attorney general of the State of New York:

The undersigned, the receiver of the Lebanon Springs Railroad Company, respectfully reports for the quarter ending June 30, 1881:

That in the action wherein Marvin Sackett is plaintiff, he was appointed receiver of the Lebanon Springs Railroad Company by an order of the supreme court dated October 1, 1880, and duly filed with the clerk of Rensselaer county.

That in the action wherein The People are the plaintiffs, — appointed receivers of said railroad company by an order of the supreme court, dated the 4th day of December, 1880, and duly entered with the clerk of Albany county.

That under each of said orders the undersigned has duly qualified, and — now in possession of said railroad and is operating the same.

That pursuant to an order of the supreme court, held in the city of Kingston and county of Ulster, on the 2d day of April, 1881, authorizing and directing me as receiver of said railroad to issue under my hand receiver's certificates of indebtedness, I have issued in the aggregate the sum of $350,000, in certificates of $500 each, and with the proceeds of such of said certificates as have been nego-
389 tiated, have paid and discharged the $25,000 of certificates heretofore issued by authority of an order of the court, dated the 25th day of October, 1880, and have canceled the same and have paid the interest thereon.

That the said railroad is being improved by adding to its equipment and its buildings, and by repairing its road-bed as rapidly as possible.

That the following is the report of the undersigned, as required by statute, as to receipts and disbursements for the quarter ending June 30, 1881:

Cash Receipts.

Cash balance on hand April 1, 1881		$2,978 00
Cash received from agents and conductors	$22,270 51	
B. H. T. and W. R'way Co	688 91	
Peterson & Packer	235 69	
Overcharge on freight	11 34	
E. Cram	1,075 00	
Sales old material	1,442 61	
Receiver's certificates, first issue	2,900 00	
Receiver's certificates, second issue	146,500 00	
P. O. Department	700 10	
National Ex. Co	187 50	
Unclaimed pay-rolls	45 75	
Miscellaneous items	7 12	
		176,064 53
		$179,042 53

Disbursements.

To station agents to pay advance charges to connecting roads	$3,570 81
Overcharge on freight	100 77
390 Damages to persons	57 00
Lumber and hardware	1,694 01
J. W. Van Valkenburgh	6,240 00
Receiver's certificates, first issue	23,700 00
Interest	5,334 04
Rents	511 25
Cars purchased	4,800 00
Engines	9,466 40
New rails, bolts and spikes	55,567 50
Ties and posts	7,660 45
Fuel	4,524 64
Oil and waste	431 93
Printing, stationery and advertising	918 86
Repairs of engines and cars	2,191 89
Boston and Albany R. R. Co	272 24
Troy and Boston R. R. Co	42 69
Delaware and Hudson Canal Co	1 83
New York Central and H. R. R. R. Co	51 25
Agents and employés in April	4,681 93
" " May	5,449 71
" " June	6,884 40
Miscellaneous bills	6,836 16
Balance	28,052 77
	$179,043 53
Cash on hand July 1, 1881	$28,052 77

Earnings.

	April.	May.	June.	Total.
Passenger	$999 02	$1,023 71	$1,386 21	$3,408 94
Freight	5,509 61	5,535 40	5,304 40	16,399 41
Mail	224 26	233 40	233 40	691 06
Express	62 50	62 50	62 50	187 50
Total	$6,795 39	$6,905 01	$6,986 51	$20,686 91

Total earnings for quarter ending June 30, 1881	$20,686 91
Total earnings for quarter ending March 31, 1881	18,353 34
Total earnings for quarter ending December 31, 1880	9,514 26
Total	$48,554 51

391 *Charges Against Earnings.*

Expense of maintaining and operating road	$25,473 44
Fuel	7,528 47
Taxes	129 25
Oil and waste	617 04
Repairs of engines	453 00
Repairs of cars	2,072 61
Overcharge on freight	123 04
Loss and damage of goods and property	147 65
Damages for injuries to persons	57 00
Hire of cars	485 54
Rents	2,975 49
Contingencies	2,834 47
Balance	5,657 51
	$48,554 51

Balance-sheet.

Assets.

Cash on hand	$28,052 77
Five locomotives, etc., etc	17,625 85
Five passenger coaches and one baggage car	9,076 10
Hand and rubble cars	680 65
Cost of new rails	54,868 64
Cost of nuts, bolts and spikes	4,211 24
Cost of ties	7,080 90
Real estate	75 00
Due from agents and conductors	2,381 62
National Express Company	60 00
P. O. Department	591 48

Railroad companies	22 80
Other items	1,610 82
Improvements and additions to railroad bed	14,388 88
Improvements to buildings	3,448 08
Other improvements and repairs	15,670 54
Adding to bridges	605 34
392 Adding to telegraph line	81 05
Adding to fences and posts	721 24
J. W. Van Valkenburgh	6,395 72
Fuel and supplies on hand	2,000 00
	$169,598 72

Liabilities.

Receiver's certificates, second issue	$146,500 00
Current bills and pay-rolls	13,302 27
Due railroad companies	650 58
Sales old material	1,442 61
Unclaimed accounts, pay-rolls	45 75
Balance of earnings due, as above shown	5,657 51
Fuel and supplies on hand	2,000 00
	$169,598 72

ALBANY CITY AND COUNTY, *ss:*

John W. Van Valkenburgh, being duly sworn, says that he is the receiver of the Lebanon Springs Railroad Company; that the foregoing report by him signed is in all respects correct and true; that all moneys received and disbursed by him, and the sources of receipts, and the objects and cause of the disbursements thereof are correctly and truly stated therein.

J. W. VAN VALKENBURGH.

Sworn to before me this 29th day of July, 1881.

W. W. BRINKERHOFF,
Notary Public, Albany County.

393 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD COMPANY, Defendant.

To the supreme court of the State of New York and the attorney general of the State of New York:

The undersigned, the receiver of the Lebanon Springs Railroad Company, respectfully reports for the quarter ending September 30, 1881:

That in the action wherein Marvin Sackett is plaintiff he was appointed receiver of the Lebanon Springs Railroad Company by an order of the supreme court, dated October 1, 1880, and duly filed with the clerk of Rensselaer county.

That in the action wherein The People are the plaintiffs he was appointed receiver of said railroad company by an order of the supreme court, dated the 4th day of December, 1880, and duly entered with the clerk of Albany county.

394 That under each of said orders the undersigned has duly qualified, and is now in possession of said railroad, and is operating the same; that the following is the report of the undersigned, as required by statute, as to receipts and disbursements for the quarter ending September 30th, 1881:

Cash Receipts.

Cash balance on hand July 1st, 1881		$28,052 77
Cash rec'd from agents and conductors	$25,026 70	
Pitman & Packer	1,035 61	
Interest	557 03	
Sales old material	15,817 18	
Receiver's certificates, second issue	66,000 00	
P. O. Department	709 16	
Nat'l Express Co	187 50	
Ground rent	25 00	
Miscellaneous items	1,508 10	
		10,866 28
		$138,919 05

Disbursements.

To station agents, to pay advance charges to connecting roads	$3,407 30
Troy and Boston R. R. Co	2,574 90
Boston and Albany R. R. Co	1,097 22
Boston, H. T. & W. R. R. Co	1,769 93
N. Y. C. & H. R. R. R. Co	109 09
Delaware and Hudson Canal Co	11 30
Fitchburg R. R. Co	8 50
Telegraph poles	30 30
Land and land damages	29,467 41
New rails, nuts and bolts	33,842 81
Overcharge on freight	48 00
Ties	8,721 72
395 Right of way	358 75
Oil and waste	280 63
Station fuel	2 50
Taxes	863 64
Printing and advertising	331 06
Painting	154 19
Lumber	1,246 95

Castings, &c., for turn-table	288 88
Loss and damage of goods	239 61
Legal expenses	2,278 26
Depot privileges	460 00
Fuel	2,594 13
General superintendence	1,808 14
Repairs cars	159 03
Repairs engines	879 94
Hardware	695 08
Stationery	60 49
Office furniture	133 75
Machine-work	38 93
Engine, car and track supplies	164 86
Damages for injuries to persons	37 60
Hire of cars	482 87
Discount on receiver's certificates, second issue	670 00
One passenger coach	1,950 00
Sundry bills	907 44
Petty disbursements	149 20
Agents and employés, in July, Aug. and Sept	31,893 06
Balance	8,701 58
	$138,919 05
Cash on hand October 1st, 1881	$8,701 58

Earnings for Quarter Ending September 30th, 1881.

	July.	August.	September.	Total.
Passengers	$1,930 75	$2,661 85	$2,506 67	$7,099 27
Freight	4,267 26	4,985 74	5,502 37	14,755 37
Express	65 00	62 50	62 50	190 00
Mail	235 00	284 07	401 74	920 81
Total	$6,498 01	$7,994 16	$8,473 28	$22,965 45

396 Earnings for quarter ending September 30th, 1881	$22,965 45
Earnings for quarter ending June 30th, 1881	20,686 91
Earnings for quarter ending March 31st, 1881	18,353 34
Earnings for quarter ending December 31st, 1881	9,514 26
Total earnings	$71,519 96

Charges Against Earnings.

Expense of maintaining and operating road	$35,201 04	
Fuel	9,198 72	
Taxes	964 44	
Oil and waste	590 31	
Repairs of engines and tenders	1,790 82	
Repairs of cars	2,283 32	
Overcharge on freight	171 04	
Loss and damage to goods and property	224 14	
Damages for injuries to person	94 60	
Hire of cars	968 41	
Rents	-3,560 49	
	$55,047 33	
Contingencies	2,238 23	
	$57,285 56	
Deduct for fuel and supplies on hand, estimated	3,000 00	
		$54,285 56
Balance, showing profits		17,234 40
		$71,519 96

Balance-sheet.

Assets.

Cash on hand		$8,701 58
Five locomotives, tenders and fixtures		20,684 90
Six passenger coaches and one baggage car		13,340 73
Ten freight charcoal cars		7,071 50
Hand and rubble cars		780 65
Cost of new rails		98,523 50
397 Cost of nuts, plates and bolts		5,013 61
Cost of ties		24,815 27
Real-estate land damages		30,571 16
Due from agents and conductors		3,963 18
Due from National Express Company		62 50
Due from Post-office Department		803 13
Due from railroad companies		200 88
Improvements and additions to road-bed		37,965 16
Improvements and additions to buildings, including three turn-tables		6,015 26
Other improvements		6,104 29
Improvements to bridges		2,355 34
Improvements to telegraph line		694 20
Improvements to fences and gates		1,013 24
Fuel and supplies on hand (estimated)		3,000 00
		$271,680 08

Liabilities.

Receiver's certificates, second issue	$212,500 00
Current bills and pay-rolls	23,417 03
Other railroad companies	1,223 11
Sales, old material	17,259 79
Unclaimed amounts, pay-rolls	45 75
Balance	17,234 30
	$271,680 08

J. W. VAN VALKENBURGH.

ALBANY CITY AND COUNTY, *ss:*

John W. Van Valkenburgh, being duly sworn, says that he is the receiver of the Lebanon Springs Railroad Company, that the foregoing report by him signed is in all respects correct and true; that all moneys received and disbursed by him and the sources of receipts and the object and cause of disbursements thereof are correct and truly stated therein.

J. W. VAN VALKENBURGH.

Sworn to before me this 31st day of October, 1881.

SIMON MEYERS,
Commissioner of Deeds, Albany, N. Y.

398 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD COMPANY, Defendant.

To the supreme court of the State of New York and the attorney general of the State of New York:

The undersigned, the receiver of the Lebanon Springs Railroad Company, respectfully reports for the quarter ending December 31st, 1881.

That in the action wherein Marvin Sackett is plaintiff he was appointed receiver of the Lebanon Springs Railroad Company by an order of the supreme court, dated October 1st, 1880, and duly filed with the clerk of Rensselaer county.

That in the action wherein The People are the plaintiffs, he was appointed receiver of said railroad company by an order of the supreme court, dated the 4th day of December, 1880, and duly entered with the clerk of Albany county.

399 That under each of said orders the undersigned has duly qualified and is now in possession of said railroad, and is operating the same.

That the following is the report of the undersigned, as required by statute, as to receipts and disbursements for the quarter ending December 31st, 1881.

Cash Receipts.

Cash balance on hand October 1st, 1881		$8,701 58
Rec'd from agents and conductors	$28,345 10	
railroad companies	484 72	
receiver's certificates, second issue	23,500 00	
J. W. Van Valkenburgh	1,500 00	
sales old material	15,303 45	
National Express Co.	187 50	
Peterson & Packer	1,266 18	
P. O. Department	803 13	
wood sold	488 62	
sundry sources	22 80	
unclaimed amounts, pay-rolls	57 45	
		71,958 95
		$80,660 53

Disbursements.

To station agents to pay advance charges to connecting roads	$3,540 39
railroad and steamboat companies	2,551 94
general superintendence	1,095 14
stationery, printing and advertising	605 62
turn-table at Chatham	330 86
unclaimed amounts, pay-rolls	54 35

400

castings and supplies	891 52
charcoal cars	4,293 00
interest	10,500 00
legal expenses	234 20
station rents and privileges	460 00
office rents and privileges	88 75
engine fuel	4,849 51
taxes on real estate	293 83
lumber	1,813 29
loss and damage of goods, etc.	223 23
overcharge on freight	63 61
car service	148 37
railroad ties	6,228 70
agents and employees in October, November and December, 1881	24,854 97
paints, painting and glass	330 11
engines and car fixtures	263 75

station buildings	1,676 35
repairs, engines and cars	205 60
freight charges on car supplies	261 04
arrears of taxes for 1877 and 1878	888 92
North Petersburgh bridge	1,450 00
petty disbursements	417 61
balance	12,045 87
	$80,660 53
cash on hand January 1st, 1882	$12,045 87

Earnings for Quarter Ending December 31, 1881.

From passengers	$4,744 07
freight	18,001 01
express	187 50
mail service	803 13
car service	5 38
	$23,741 09

401 *Charges Against Earnings.*

Repairs of track	$2,651 32
engines, cars and machinery	903 58
Office expenses and incidentals about shops	198 57
Wages of employés in operating road	8,149 68
Taxes	108 91
Fuel	2,046 33
Oil and waste	287 87
Loss and damage to goods in transportation	182 08
Damages for injuries to persons	28 00
to property by fire	40 00
Hire of cars	237 34
Rents	460 00
Stationery, printing and advertising	565 58
Train and track supplies	233 33
Overcharge on freight	56 57
Contingencies	363 41
	$16,539 51
Balance showing surplus for quarter ending December 31, 1881	$7,196 14
Surplus shown by last quarterly report, including $3,000 for fuel and supplies on hand	17,234 40
Total surplus earnings to date	$24,430 54
Deduct interest account to date	15,757 19
Net surplus at date	$8,673 35

Balances-sheet.

Assets.

Cash	$12,045 87
Due for agents and conductors	2,039 43
Discount on receiver's certificates, first and second issues	31,566 11
Grading and masonry	11,603 20
402 Bridges	5,513 34
Superstructure	46,862 83
Passenger and freight stations	12,745 42
Engine-houses, car-houses, etc	5,895 66
Land, land damages, fences and gates	31,517 24
Locomotive engines and tenders	24,041 29
Passenger and baggage cars	14,533 73
Freight cars	8,194 28
Hand and rubble cars	827 30
Telegraph line	728 20
Contingents	1,014 60
Cost of iron used in rebuilding track	66,753 94
" ties used in rebuilding track	34,863 47
" bolts, nuts and spikes	5,055 17
Arrears of taxes and other items	1,063 92
National Express Company	62 50
Post-office Department	803 13
Due from other railroads	250 22
Due from Peterson & Packer for coal transportation	397 14
Fuel and supplies on hand (estimated)	3,000 00
	$320,876 99

Liabilities.

Receiver's certificates, second issue	$293,111 11
Unclaimed amounts, pay-rolls	48 85
Due other roads	1,451 25
Other accounts	389 18
Current bills and pay-rolls	17,203 25
Balance showing surplus after paying interest to December 31, 1881	8,673 35
	$320,876 99

J. W. VAN VALKENBURGH.

ALBANY CITY AND COUNTY, *ss:*

403 John W. Van Valkenburgh, being duly sworn, says that he is the receiver of the Lebanon Springs Railroad Company; that the foregoing report by him signed is in all respects correct and true; that all moneys received and disbursed by him, and the sources of receipts and the object and cause of disbursements thereof are correctly and duly stated therein.

J. W. VAN VALKENBURGH.

Sworn to before me this 31st day of January, 1882.
W. W. BRINKERHOFF,
Notary Public, Albany County.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE LEBANON SPRINGS RAILROAD COMPANY, Defendants.

To the supreme court of the State of New York and the attorney general of the State of New York:

The undersigned, the receiver of the Lebanon Springs
404 Railroad Company, respectfully reports for the quarter ending March 31st, 1882, that in the action wherein Marvin Sackett is plaintiff, he was appointed receiver of the Lebanon Springs Railroad Company by an order of the supreme court, dated October 1st, 1880, and duly filed with the clerk of Rensselaer county.

That in the action wherein The People are the plaintiffs, he was appointed receiver of said railroad company by an order of the supreme court, dated the 4th day of December, 1880, and duly entered with the clerk of Albany county.

That under each of said orders the undersigned has duly qualified, and is now in possession of said railroad, and is operating the same.

That the following is the report of the undersigned, as required by statute, as to receipts and disbursements for the quarter ending March 31st, 1882.

Cash Receipts.

Cash balance on hand January 1st, 1882		$12,045 87
Received from agents and conductors ..	$20,527 86	
car service.....	84 94	
Peterson & Packer.....	690 58	
sales old material.....	4,578 45	
National Express Co....	187 50	
unclaimed am'ts and pay-rolls.....	40 90	
Post-office Department ..	803 13	
railroad companies.....	1,190 96	
fuel sold..... ..	1,325 41	
receiver's certificates, 2d issue..... ...	4,000 00	
sundry sources.....	1,522 93	
		34,952 66

405 *Disbursements.*

Fuel	$2,024 66	
Oil and waste	93 55	
General superintendence	622 81	
Other railroad companies	4,230 76	
Agents to pay advance charges to connecting roads	2,991 20	
Lumber	1,910 34	
Stationary, printing and advertising	389 95	
Taxes	166 10	
Machinery, hardware and supplies	1,699 24	
Agents and employés in January, February, March, 1882	16,579 41	
Ties	1,538 65	
Painting, building, cars, &c	347 01	
Rents	368 75	
Repairs of engines	265 64	
Gilbert, Bush & Co	2,000 00	
M. T. Seymour & Co	426 26	
Sundry items	1,227 89	
Balance cash on hand April, 1882	6,416 31	
	$46,998 53	$46,998 53

Earnings for Quarter Ending March 31st, 1882.

From passengers	$4,146 95	
freight	16,313 63	
express	187 50	
mail service	803 13	
other sources	94 04	
		$21,545 25
Earnings for quarter ending December 31st, 1882		23,741 09
		$45,286 34

406 *Charges Against Earnings for Six Months Ending March 31st, 1882.*

Repairs of tracks and bridges	$4,652 85	
engines, cars and machinery	1,650 90	
Wages of employés in operating road	16,870 57	
Taxes	257 76	
Fuel	3,856 63	
Oil and waste	726 81	
Loss and damage to goods in transportation	180 73	
Damages for injuries to persons	28 00	
Damages to property by fire	40 00	
Hire of cars	744 45	
Rents	3,447 39	

General office, shops' expenses, printing, stationery	1,652 58	
Train and truck supplies	381 65	
Overcharge on freight	304 60	
Contingencies, including shoveling snow	883 70	
		$35,688 62
Balance showing surplus for six months ending March 31st, 1882		$9,597 72
Add surplus shown for year ending September 30th, 1881, as per report		17,234 40
		$26,832 12
Deduct interest account to date		15,757 19
Net surplus to date		$11,074 93

Balance-sheet.

Assets.

Cash	$6,416 31
Due from agents and conductors	3,424 38
407 Discount on receiver's certificates, first and second issue	31,566 11
Grading and masonry	12,857 32
Bridges, new bridge at North Petersburgh included	9,962 67
Superstruction	49,380 15
Passenger and freight stations	13,340 10
Engine-houses, car-houses, etc	7,544 92
Land, land damages, fences and gates	31,522 24
Locomotives, engines and tenders	25,264 68
Passenger and baggage cars	14,894 29
Freight cars	8,249 31
Hand and rubble cars	827 30
Telegraph line	880 20
Contingents	1,014 60
Cost of iron used in rebuilding track	62,175 49
Cost of ties used in rebuilding track	34,443 32
Cost of nuts, plates and bolts used in rebuilding track	5,055 17
Arrears of taxes and other items	1,063 92
National Express Co	62 50
Post-office Department	803 13
Due from other railroads	
Due from Peterson & Packer for local transportation	135 65
Fuel and supplies on hand, estimated	3,000 00
	$323,833 76

Liabilities.

Receiver's certificates, second issue	$297,111 11
Unclaimed amounts, pay-rolls	78 40
Due other roads	378 05
Other accounts	389 18
Current bills and pay-roll	14,852 09
Balance showing net surplus to date	11,074 93
	$323,883 76

408 ALBANY CITY AND COUNTY, *ss:*

John W. Van Valkenburgh, being duly sworn, says that he is the receiver of the Lebanon Springs Railroad Company; that the foregoing report, by him signed, is in all respects correct and true; that all moneys received and disbursed by him and the sources of receipts and the object and cause of disbursements thereof are correctly and truly stated therein.

J. W. VAN VALKENBURGH.

Sworn to before me this 29th day of April, 1882.

W. W. BRINKERHOFF,
Notary Public, Albany County.

New York Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSEL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Co., Defendants.

To the supreme court of the State of New York:

The petition of William Butler Duncan and Trenor W. Park respectfully states as follows, that is to say:

409 First. That on and prior to the 1st day of July, 1867, the Lebanon Springs Railroad Company was a corporation duly created, organized and existing under and by virtue of the laws of the States of New York and Vermont, and as such owned and had all the rights, property and franchises of a railroad corporation of, in and to the several pieces or parcels of land, constituting the track and roadway of a railroad, commencing at Chatham Four Corners, in Columbia county, New York, and extending northeasterly to the boundary line between the States of New York and Vermont, in the town of Hoosick in the said State of New York, and thence to the village of Bennington, in the State of Vermont, together with all the rails, bridges, fences, stations, station-houses, buildings and other structures thereon, and all the appurtenances thereunto belonging, and the rents, income and profits thereof and with all the powers, rights and franchises of a railroad corporation.

Second. That on or about the said 1st day of July, 1867, the said company duly executed and issued under that date, its certain bonds to the aggregate amount of $2,000,000, payable in thirty years from the date thereof, with interest in the meantime at the rate of seven per cent. per annum, payable on the first days of July and January of each year, and at the same time to secure the payment of said bonds and the interest thereon, as therein mentioned, the said Lebanon Springs Railroad Company duly made, executed and delivered to the Union Trust Company of New York a mortgage upon all of its aforesaid property, and in and by which mortgage it was provided that, upon default being made in the payment of the interest upon said bonds, the whole sum secured by said mortgage should become and be due and payable.

Third. That afterwards, and in or about the latter part of the year 1869, or the early part of the year 1870, the said Leba-
410 non Springs Railroad Company, and its road, franchises and property were duly consolidated, in accordance with law, with the roads, franchises and property of the Bennington and Rutland Railroad Company, a corporation duly created, organized and existing under the laws of the State of Vermont, and operating a railroad from Bennington in said State, where it connected with the railroad of the said Lebanon Springs Railroad Company, with a branch about two miles in length, running to Rutland, in the said State of Vermont, and from North Bennington in a westerly direction to the New York State line, and one company formed of the said two companies, under the name of the Harlem Extension Railroad Company, which became thereby the owner of and entitled to all the rights, properties and franchises of said two railroad companies, and subject to all their liabilities; and your petitioners further state that in forming such consolidation the road, franchises and property of the Lebanon Springs Railroad Company were valued and put in at $2,000,000 of bonds and the same amount of stock, and the road, franchises and property of the said The Bennington and Rutland Railroad Company were likewise valued and put in at $2,000,000 of bonds and the same amount of stock.

Fourth. That afterwards, and on or about the 1st day of April, 1870, the said Harlem Extension Railroad Company executed its certain bonds to the amount of $4,000,000, in part intended to take up and be issued and exchanged for the above-mentioned $2,000,000 of bonds of the said Lebanon Springs Railroad Company, and also the $500,000 of bonds of the said Bennington and Rutland Railroad Company (which had been issued prior to its consolidation as aforesaid, and were then outstanding and secured by a mortgage upon the road, property and franchises of the said Bennington and Rut-
land Railroad Company), and the said Harlem Extension
411 Railroad Company at the same time, to secure the payment of its said bonds, executed a mortgage upon its roads, property and franchises to the Union Trust Company, of New York; that of the said $4,000,000 of bonds only $1,500,000 were issued, the remainder being reserved to be exchanged for the bonds hereinbe-

fore referred to as issued by the Lebanon Springs Railroad Company and by the Bennington and Rutland Railroad Company.

Fifth. That your petitioner Trenor W. Park held and owned and still holds and owns over $600,000 of the said bonds issued by the Harlem Extension Railroad Company, and over $300,000 of the bonds issued by the Lebanon Springs Railroad Company.

Sixth. That in or about the month of December, 1872, such proceedings were had under the laws of the States of New York and Vermont that the road, franchises and property of a corporation theretofore created and known as the Pine Plains and Albany Railroad Company were consolidated with the roads, franchises and property of the said Harlem Extension Railroad Company, but the name of the latter company remained unchanged, and that afterwards and in or about the said month of December, such further proceedings were had, that the roads, franchises and property of the said Harlem Extension Railroad Company were consolidated with the roads, franchises and property of the New York, Boston and Northern Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and the corporation created by this last consolidation assumed the name of the New York, Boston and Montreal Railway Company.

And your petitioners further state that the consolidations last mentioned grew out of an arrangement, the main feature and principal point in which, so far as it related to the said The
412 Harlem Extension Railroad Company, was the payment of the mortgage and unsecured debts of said company, and the transaction, as between the said Harlem Extension Railroad Company and the said other companies with which it was consolidated, was substantially one of bargain and sale, whereby the said Harlem Extension Railroad Company undertook and agreed to transfer its road, franchises and property to the said consolidated company, known as the New York, Boston and Montreal Railway Company, for a certain sum of money and certain securities to be paid by said last-named company.

Seventh. That at the time said arrangement was made and the said last consolidation was being effected, the bonds of the Lebanon Springs Railroad Company and of the Harlem Extension Railroad Company, hereinbefore referred to, were held by various towns in the States of New York and Vermont and by numerous individuals, and the unsecured creditors thereof were numerous and scattered, and it was therefore found to be impracticable to secure the assent of all the persons and corporations interested in said railroads to the exact terms of the proposed compromise and adjustment of the debts of the said railroad corporation, contemplated by the consolidation agreement and the aforesaid transfer; and, therefor, after the execution of the consolidation agreement, and some time in the months of December, 1872, and January, 1873, such proceedings were had that the above-mentioned mortgage, executed by the Lebanon Springs Railroad Company, was, by separate proceedings in the States of New York and Vermont, duly foreclosed, and that part of the mortgaged premises situated in the State of New York

was purchased by James C. Hull at the sale made in pursuance of the decree in the foreclosure proceedings in such State, and that portion of the mortgaged premises lying in the State of Ver-
413 mont was purchased by Charles G. Lincoln at the sale made in pursuance of the decree in the foreclosure proceedings in that State.

And your petitioners further state that at about the same time the aforesaid mortgage, made by the Harlem Extension Railroad Company, default having been made in the payment of the interest thereon, was likewise, under the provisions thereof, duly foreclosed in the State of Vermont, and the remaining part of the premises of said last-named railroad company, situated in the State of Vermont, not before sold, was also sold under the decree in such foreclosure proceedings, and was purchased by the said Charles G. Lincoln. And your petitioners further state that, in pursuance of the said foreclosures and sales, the said premises were duly conveyed to the purchasers, Hull and Lincoln, respectively.

Eighth. That thereafter, and on or about January 28th, 1873, the said Hull and Lincoln joined in executing a bond for five million dollars, and to secure the payment of said bond, at the same time duly made, executed and delivered a mortgage upon all and singular the roads, franchises and property so purchased by them to your petitioner William Butler Duncan, in which your petitioner Trenor W. Park was nominally joined as a mortgagee by reason of his large interest in the bonds of said Lebanon Springs Railroad Company and of said Harlem Extension Railroad Company, it being, however, understood by and between them and the other holders of the bonds of said last two mentioned railroad companies, that your petitioner Park was only a nominal party thereto and that your petitioner Duncan was to be the only acting mortgagee and was to receive any and all payments that might be made under or on account of the sum secured by said bond and mortgage. And your petitioners further state that such last-mentioned mortgage represented substantially the aggregate indebtedness of the Harlem
414 Extension Railroad Company which the New York, Boston and Montreal Railroad Company was to assume and pay according to the terms of the said consolidation agreement and arrangement, and was made in order to secure and maintain a lien upon the said premises for the payment of such indebtedness and so that the conveyance of said premises by the purchasers thereof to the said New York, Boston and Montreal Railroad Company when made should be subject to said lien.

Ninth. That thereafter, and on or about the 30th day of January, 1873, the said Hull and Lincoln conveyed the said premises to the New York, Boston and Montreal Railway Company, subject to the lien of the mortgage hereinbefore mentioned, made by the Bennington and Rutland Railroad Company to secure the payment of the sum of five hundred thousand dollars, and also to the lien of said last-mentioned mortgage, made by Hull and Lincoln to secure the payment of five million dollars.

Tenth. That on or about the 3d day of November, 1873, your

petitioners joined with the New York, Boston and Montreal Railway Company in making a lease of said premises, together with the rolling stock and other property thereon (for the reason that your petitioners had an interest in said rolling stock and other property), to the Central Vermont Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Vermont, which lease was substantially in the form annexed to the complaint in the above-entitled action and marked Schedule A, but for greater certainty as to the terms and form of said lease your petitioners pray leave to refer to the original or a certified copy thereof; and your petitioners further state that some time in the month of August, 1877, the said Central Vermont Railroad Company abandoned the said lease and premises and ceased to run or operate the said railroad.

415 Eleventh. That afterwards, in a suit commenced in the court of chancery of the State of Vermont for the strict foreclosure of the before-mentioned mortgages, made by the Bennington and Rutland Railroad Company to secure the payment of five hundred thousand dollars, default having been made in the payment of interest thereon, such proceedings were had that at the June term of said court in the year 1877 a decree was duly made for strict foreclosure, whereby it was provided that the defendants in said suit should pay the amount thereby found and decreed to be due on or before a certain day therein fixed or forever be barred from all right or equity of redemption; that the defendants therein failed to make said payment or any portion thereof, or to redeem the premises, and that after the lapse of the time fixed for redemption, and in the summer and fall of the year 1877, the holders of the bonds of the said Bennington and Rutland railroad, organized under and in accordance with the laws of the State of Vermont, a new company called the Bennington and Rutland Railway Company, which new company has since owned and now owns and operates, the said line of railroad formerly belonging to the Bennington and Rutland Railroad Company.

Twelfth. That the said The New York, Boston and Montreal Railway Company has failed to pay the amount secured by said $5,000,000 mortgage made by Hull and Lincoln as aforesaid, and has, as your petitioners are informed and believe, become and is wholly insolvent and unable to pay the same; and that the said mortgage, which is now a valid and subsisting lien upon the entire roads, franchises and property of the said The Harlem Extension Railroad Company, other than the portion thereof formerly owned by the Bennington and Rutland Railroad Company as aforesaid, and including the premises mentioned and described in the complaint in the above-entitled action, is now due and unpaid.

416 Thirteenth. Your petitioners further state that they are informed and believe that, on or about the — day of September, 1880, the above-named plaintiff, Marvin Sackett, commenced an action in this court against the above-named defendants, praying, among other things, that a receiver be appointed to operate and maintain said Lebanon Springs Railroad Company, and to hold and

preserve its property and franchises for the benefit of the holders of the bonds of the said Lebanon Springs Railroad Company, under the above-mentioned mortgage made by it, and that the railroad and franchises of said company might be sold for the benefit of said bondholders and distribution made thereof; and your petitioners further state that they are not made parties to said action, and that any and all proceedings heretofore had or taken therein have been taken without any notice to them, and are invalid, and void of effect as to them.

Fourteenth. That as your petitioners are informed and believe, they, as mortgagees as aforesaid, and your petitioner, Trenor W. Park, as the holder and owner of $300,000 of bonds of the said The Lebanon Springs Railroad Company, and over $600,000 of bonds of the said Harlem Extension Railroad Company, have an interest in the subject of said action and controversy, and in the real property, the title to which will be effected by the judgment therein, and are proper and necessary parties thereto, and that a complete determination of said controversy cannot be had without their presence; that the interest of your petitioners is adverse to the interest of the said plaintiff, and that therefore your petitioners should be made parties defendant to said action.

Wherefore, your petitioners pray that they may be made parties defendant to the said above-entitled action, and may be allowed to come in and defend the same as they may be advised, and that this court will accordingly order and direct that they be made such par-
417 ties by the proper amendment to the original complaint therein, and be allowed a proper and sufficient time to prepare and serve their answer to such amended complaint, and that all proceedings heretofore had in said action be declared to be invalid, void and of no effect as to them.

And your petitioners will ever pray, etc.

(Signed) W. BUTLER DUNCAN.
TRENOR W. PARK.

J. G. McCULLOUGH,
Attorney for Petitioners.

CITY AND COUNTY OF NEW YORK, *ss:*

William Butler Duncan, of said city, being duly sworn, deposes and says, that he is one of the petitioners named in the foregoing petition; that he has read the said petition by him subscribed; and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. And further saith not.

(Signed) W. BUTLER DUNCAN.

Sworn to before me this 6th day of November, 1880.

[SEAL.] JOHN H. IVES,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

418 New York Supreme Court, Rensselaer County,

MARVIN SACKETT
against
RUSSELL C. ROOT and Others. } Cadman's Report.

To the supreme court of the State of New York:

The undersigned, appointed by an order of this court, bearing date the first date of September, 1883, sole referee to take and state the accounts of John W. Van Valkenburgh, late receiver of the Lebanon Springs Railroad Company, and state the condition of said trust and trust property, and all accounts, claims and demands outstanding against said receiver together with the costs, counsel and expenses of the above action and the persons claiming the same and the amounts thereof, and report the same to the court with his recommendations thereon to the end that the said trust may be closed, so far as said Van Valkenburgh has been connected therewith.

Do respectfully report, that I have attended, as such referee, at the law office of Edward Newcomb, in the city of Albany, on the 6th day of October, 1883, pursuant to due notice as required by said order of reference, and on divers other days thereafter, to which the said hearing before me as such referee was from time to time adjourned.

That the plaintiff in said action appeared before me on such hearings by the Hon. Hugh W. McClellan, his attorney and counsel therein.

That John W. Van Valkenburgh, said late receiver, appeared before me on such hearings by Edward Newcomb, Esq., as his attorney and counsel herein.

419 That the Hon. Hamilton Harris appeared before me on such hearings for Wm. V. Reynolds, the present receiver of said railroad company, and also represented F. L. Westbrook, Esq., and E. W. Page, Esq., attorneys named in said order of reference, and,

That the Central National Bank of Boston, Mass., was represented on said hearings before me by Hale and Buckley, Esqs., and H. D. Hyde, Esq., who appeared as attorneys and counsel for said bank, and that Robert E. Andrews, Esq., and J. Rider Cady, Esq., also appeared before me on said hearings for the purpose of presenting and proving claims against said late receiver; and William C. Van Alstyne, also appeared before me for the purpose of presenting a claim against said late receiver.

And after hearing the proofs and allegations of the respective parties, I find the following as matter of fact:

First. That the said John W. Van Valkenburgh took possession of said railroad immediately after his appointment as such receiver, and that he found the same at that time in an extremely dilapidated condition, wholly without engines, cars or rolling stock of any kind, and also destitute of machinery, tools or apparatus for working, repairing or running the same, and with the depot buildings

out of repair and mostly destitute of furniture, and the road-bed and track, bridges and trestle works in bad condition, unfit and unsafe for use as a railroad; all of which made it necessary in order to the fulfilling of said trust that large amounts of money should be raised and expended in repairing and equipping said road in order to put it in condition to produce any income whatever. That on the 25th day of October, 1880, an order was made by this court in this action authorizing said receiver to issue certificates of indebtedness to the amount of twenty-five thousand dollars, to be a first lien upon the net profits of said railroad company for
420 the purpose of employing such railroad stock and making such improvements, and for the purchase of necessary material, including engines, cars and tolls for the operation of said railroad. That it appears by the accounts of said Van Valkenburgh as such receiver as hereinafter set forth that more than $25,000 of such certificates were issued by him under said order, but that such overissue was only for the purpose of renewing, or taking up, other of such certificates, so that not more than $25,000 of such certificates were at any one time issued or outstanding.

That on the 2d day of April, 1881, there was another order made by this court and entered in this action, authorizing and directing said Van Valkenburgh as such receiver to issue other certificates of indebtedness to the amount of $350,000, and to negotiate said certificates, and with the moneys arising therefrom said receiver was, in and by said order, directed: first, to pay and discharge the $25,000 of certificates theretofore authorized by said order of October 25, 1880, and second, to purchase all necessary material for the repairs of said road, and pay and discharge all necessary expenses incident to the repairs thereof, with all other expenses attending the running and successful managing and operating of said railroad, as by the order appointing him receiver herein is provided, together with such indebtedness as may be found due to claimants by the referee therein named, and appointing Hon. E. Smith Strait a referee to hear and determine all existing claims said Lebanon Springs Railroad Company then filed, or thereafter to be filed with said receiver, said $350,000 of certificates so authorized and directed to be issued to be a first lien on said railroad bed, track, ties, bridges, trestles, culverts, engines, cars, depots and all and every kind of property, either owned by said railroad company or in the possession of the receiver thereof, and to be recognized as
421 such in any reorganization of said company, as by the terms of said order herein will more fully appear.

Second. I find as a matter of fact, that said Van Valkenburgh, as such receiver, did proceed under and in pursuance of said order of April 2d, 1881, to issue and negotiate such certificates of indebtedness to the amount of $350,000, as authorized and directed in and by said order, and did receive therefore as the proceeds thereof the several sums of money hereinafter stated and particularly set forth in the accounts and schedules hereto annexed.

Third. I find as a matter of fact that said Van Valkenburgh as such receiver did proceed under and in pursuance of the order of

this court appointing him as such receiver and other orders of this court made and entered in this action to repair, furnish, and equip said railroad and operate the same, and that during the continuance of his said receivership other sums of money came into his hands as such receiver from various sources directly and indirectly, as the earnings of said railroad, the amounts of which are hereinafter stated and particularly set forth in the accounts and schedules hereto annexed.

Fourth. I find as a matter of fact, that in the management of said railroad and in the conduct of said business by said receiver, a certain amount of old material and property was from time to time by him sold and disposed of, from which sales certain other amounts of money came to his hands as such receiver, which amounts are hereinafter stated and fully set forth in the amounts and schedules hereto annexed, and that the above are all the sources from which it appears that any money came to the hands of said Van Valkenburgh as such receiver.

Fifth. I find as a matter of fact, that from the moneys arising from said certificates so issued by him under and in pursu-
422 ance of said order of April 2, 1881, said Van Valkenburgh, as such receiver, did pay and discharge the $25,000 of certificates theretofore issued under and in pursuance of said order of October 25, 1880, and that the balance of the proceeds of said certifiates so issued under said order of April 2, 1881, so far as the same came into the hands of said Van Valkenburgh as such receiver, together with other large amounts of moneys coming into his hands as above stated, were by him, as such receiver, expended in various sums in repairs upon said railroad and buildings and superstructures thereon, and in the purchase of rails, ties, and other material therefor, with engines, cars, tools and equipments necessary for the using and running of said railroad, the cost of all of which to said receiver *are* charged in his accounts as disbursements, as will appear in statement in the schedules hereto annexed.

That such improvements and property, except as exhausted and impaired by use, during the continuance of said Van Valkenburgh's receivership, remained in and upon said railroad, and were passed over to the new receiver appointed to succeed said Van Valkenburgh. The actual value thereof when so passed over not having been ascertained, and probably not being practically ascertainable, but that said railroad, reasonably equipped for business and in fair running order, and capable of earning a considerable income, was by said Van Valkenburgh turned over to his successors in said receivership, and the value thereof does not appear in said Van Valkenburgh's account except as above stated, with which exception the accounts and transactions of said Van Valkenburgh as such receiver, so far as the same have come to my knowledge or been made to appear in the examinations had before me, are fully set forth in the accounts and schedules hereto annexed.

Sixth. I find, as a matter of fact, that said railroad, at the time said Van Valkenburgh took possession of it as such receiver,
423 was not in a condition to earn anything or produce any in-

ome whatever, and could not have been put in such condi-
ion without large expenditures of money and much labor and
areful and skillful management, by all of which means the said
Van Valkenburgh, as such receiver, and by means of his superior
nowledge and skill as a railroad manager, by giving his personal
abor and attention to the details of said improvements and man-
gement beyond the ordinary duties of a receiver, himself, with
reat energy and superior skill, doing much to produce the success
f said railroad under his management, for which, as an ordinary
eceiver, he would have been fully justified in expending large
mounts of money, in employing other equally skilled workmen
o oversee and perform, provided such could have been employed,
lid greatly improve said railroad and put it in a condition to pro-
luce, and make it produce, a considerable income, as will appear
y the accounts and schedules hereto annexed, and that such extra
abor, skill, and energy of the said Van Valkenburgh therein was
f great value to said railroad and to all parties interested in the
uccessful management thereof, and for which said Van Valken-
urgh is entitled to a fair compensation.

Seventh. That the line of said railroad extended into the State of Vermont, and in order to its successful operation that portion of it ying in Vermont had to be run in connection with that portion ying in the State of New York, and many difficulties and compli-ations arose on account thereof, involving serious questions under he laws of the State of Vermont as to the right of said receiver to un said road in that State, and the rights of parties living in that State who had certain interests or claim to have certain interests herein or claims upon said railroad, and which required much extra care, labor, and attention on the part of said receiver outside of his duties within this State, as well as the services of coun-
424 sel to attend to matters arising within that State, for which said Van Valkenburgh is justly entitled to a fair compen-sation.

Eighth. I find as a matter of fact that the $350,000 of certificates issued under said order of April 2, 1881, were negotiated by said Van Valkenburg at an average price of a fraction over 90 per cent., or for the total sum of $315,065, as appears by Schedule "D" hereo annexed, and that at the termination of said Van Valkenburgh re-ceivership there was still due and unpaid from Edward Crane on account thereof the sum of thirty-three thousand and nine hun-dred dollars, which has been turned over to Wm. V. Reynolds, the present receiver of said railroad company, who was appointed to succeed said Van Valkenburgh in said receivership, in pursuance of a certain contract or agreement in writing made by one Wm. Foster, Jr., of which the following is a copy:

"Upon Mr. Van Valkenburg executing his resignation as receiver of the Lebanon Springs Railroad Company, and upon the acceptance of said resignation by the court, and appointment of — as receiver in the place of said Van Valkenburgh, I, William Foster, Jr., do hereby undertake that the new receiver so appointed shall, within thirty days after his appointment and after the furnishing of the

account of said Van Valkenburgh and the settlement thereof according to law, pay and discharge whatever may be due to said Van Valkenburgh upon or for his commissions as such receiver, and to wholly indemnify and save harmless the said Van Valkenburgh from all claims and liabilities as such receiver, on account of any indebtedness of Edward Crane to the said receiver or the said railroad company, he, the said Van Valkenburgh, agreeing to execute and deliver any assignment or necessary papers transferring the indebtedness of the said Edward Crane to the new receiver.

Dated June 25th, 1883.

(Signed) WM. FOSTER, JR.

Witness:

(Signed) HAMLT. HARRIS."

425 Which said agreement would seem to operate as an indemnity both to said Van Valkenburgh and to said Lebanon Springs Railroad Company, for the payment of said Crane's said indebtedness conditioned upon the resignation of said Van Valkenburgh from said receivership and the appointment of his successor as therein stated, wherefore I would recommend that in the settlement of said Van Valkenburgh's accounts as such receiver he be released and discharged from all liability on account of said indebtedness of said Crane.

Ninth. I find that there is outstanding against said Van Valkenburgh as such receiver the following accounts, claims and demands, to wit:

To McClellan & Brown, as attorneys for the plaintiffs in this action, the sum of six thousand dollars.....	$6,000	
And for services in other actions in relation to said trust, the further sum of three thousand and five hundred dollars.....	3,500	
	9,500	
Less the sum of twelve hundred dollars, which has been paid thereon.....	1,200	
		$8,300 00
To Edward Newcomb, as attorney for said receiver during the continuance of said receivership, the sum of sixteen thousand two hundred and six $\frac{83}{100}$ dollars paid thereon.....	16,206 83	
Less the sum of three thousand eight hundred and twenty $\frac{45}{100}$ dollars paid thereon.	3,820 45	
		$12,386 38
426 To Andrews & Edwards, as counsel for said receiver, the sum of one thousand and eighty-five dollars..	1,085 00	

To J. Ryder Cody, as counsel for said receiver, the sum of two hundred and forty dollars	240 00
To Hamilton Harris, for services and disbursements in this action, the sum of two thousand nine hundred and fifty dollars.	2,950 00
To Wm. C. Van Alstyne, for services as manager of said receiver, a balance of two thousand two hundred and seventy-three $\frac{83}{100}$ dollars	2,273 83
To E. A. Brett, for services as accountant in this examination, the sum of one hundred dollars	100 00

And I find as a matter of fact that it was essential and necessary that the said receiver should employ able counsel to fully advise him in the several proceedings connected with and pertaining to said trust, and to guide him in the management thereof, and in the numerous and complicated questions of law arising therein, and that said several attorneys and counsel were employed by him in different capacities, taking charge of different matters arising during the administration of said trust, including various litigations involving large amounts as well as the services rendered in the above-entitled action and on this accounting, and that the several amounts above stated are reasonable and proper charges for the services so rendered, and that the services for which such charges are made were actually and necessarily rendered for said receiver in and about the administration of said trust, and to the essential and material benefit and protection thereof, and of the rights and interests of the creditors represented by said receiver. And agreeably to the terms of said order of reference I find and recommend that said several
427 sums found due as above stated, should be charged as a first lien upon the property, real and personal estate, in the possession or under the control of the present receiver of said railroad company, or his successor or successors in office, and upon the income and earnings of said railroad to be paid prior to any other liens or claims thereon, from any moneys which now are in or may hereafter come to the hands of said receiver as such, or to his successor or successors in office.

Tenth. I find as a matter of fact that at the termination of the said receivership of said Van Valkenburgh, other claims and demands in various amounts were due to various parties, as enumerated in Schedules Nos. "1" and "2" hereto annexed. That said claims enumerated in said Schedule No. "1" have been paid by Wm. V. Reynolds, the present receiver, prior to the 17th day of June, 1884, which was the last day on which testimony was taken before me herein, and that the balance of said claims should be paid by said present receiver or his successor out of the income and earnings of said railroad together with the sum of twenty-one thousand two hundred and sixteen and $\frac{59}{100}$ dollars ($21,216.59) due at the termination of said Van Valkenburgh's receivership for interest on

the aforesaid certificates of indebtedness issued by said Van Valkenburgh as such receiver.

Eleventh. I find and recommend that the accounts of said Receiver Van Valkenburgh as filed be passed, and that he be discharged as such receiver, and that his bondsmen be released from any and all liability under or on account of their several undertakings as bondsmen herein, no item of said account having been surcharged.

That the compensation of said Van Valkenburgh as such receiver be fixed at the amount as charged in his said account on the ground of percentage on the amounts received and disbursed as
428 fixed by the order of this court and such further allowance for extraordinary services in the care, custody and management of said trust, and of the property of said railroad and the running and management thereof in the State of Vermont, and his energetic, skillful, and successful management of said trust during the term of his receivership.

All of which is respectfully submitted.

JOHN CADMAN, *Referee.*

Dated July 7th, 1884.

Filed March 4th, 1885.

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I hereby certified that I have compared the annexed copy, referee's report, with the original thereof filed in this office on the 4th day of March, 1885, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 29th day of April, 1886.

[SEAL.] SHEPARD TAPPEN, *Clerk.*

Detailed Statement of Cash Receipts.

Chatham tickets	$115,951 53
Old Chatham	10,003 89
Rayville	1,520 63
Brainard	9,164 11
West Lebanon	2,102 13
New Lebanon	20,310 95
Lebanon Springs	14,676 44
Stephentown	14,578 47
North Stephentown	1,402 47
South Berlin	4,664 15
Central Berlin	1,242 32
Berlin	15,288 46
Petersburgh	10,265 78
429 North Petersburgh	929 24
Petersburgh Junction	3,347 47

Bennington and East Hoosick	22,321 65	
Other roads	5,373 19	
Conductors, including excursion	7,820 54	
		$260,962 81
J. W. Van Valkenburgh		24,282 19
Sales of old material		39,988 96
P. and Packer		8,865 67
Receiver's certificate-; 1st issue		20,375 00
Receiver's certificate-; 2d issue		236,500 00
Interest		827 03
Loss and damaged goods in transit		26 91
Fuel sold, Eng. coal		1,907 03
E. Crane		500 00
Unclaimed amounts		183 50
Post-office Department		7,567 29
National express		2,004 16
Overcharge on freight		183 18
Rents		50 00
Repair accounts for other roads		188 09
		$604,411 82

The above item as to receiver's certificates, 2d issue, is that made up as follows (see Statement "D"):

Cash as per Statement D	$223,775 00
M. Sackett	1,000 00
H. A. Tilden	3,000 00
H. A. Tilden	6,330 00
H. A. Tilden, discount	670 00
Mrs. E. A. Carter	300 00
E. W. Bond, president	1,425 00
	$236,500 00

430 STATEMENT "A."

Statement in gross of cash receipts and disbursements by J. W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company, from Oct. 27th, 1880, to Jan. 30th, 1883, as shown by cash book, which has been verified by examination.

Receipts.		Disbursements.	
1880.		1880.	
Oct. 27 to Dec. 7	$11,935 15	Oct. 27 to Nov. 30	$6,093 51
For month of December	8,043 48	For month of December	11,751 85
1881.		1881.	
January	7,632 93	January	8,804 85
February	15,331 81	February	13,144 41
March	15,353 50	March	15,524 25
April	11,087 40	April	10,089 02

May	94,111 94	May	78,171 74
June	54,365 19	June	46,229 00
July	58,384 85	July	78,879 10
August	26,644 08	August	28,510 22
September	25,837 35	September	22,828 15
October	24,115 14	October	19,075 09
November	17,375 36	November	20,013 61
December	30,468 45	December	29,525 96
1882.		1882.	
January	12,496 59	January	18,027 18
February	7,996 27	February	7,559 58
March	14,459 80	March	14,995 46
April	14,281 44	April	16,189 19
May	10,990 47	May	9,101 99
June	6,997 32	June	9,582 64
July	13,508 43	July	13,028 85
August	12,856 06	August	9,864 85
September	19,675 70	September	21,884 25
October	12,546 43	October	11,585 15
November	8,480 87	November	9,259 41
December	12,943 56	December	13,701 57
1883.		1883.	
January	10,237 09	January	9,402 76
February	7,241 14	February	8,150 27
March	8,755 43	March	8,858 78
April	11,621 20	April	9,388 20
May	10,194 50	May	13,129 06
June	8,442 89	June	12,061 87
	$604,411 82		$604,411 82

431

STATEMENT "B."

Statement of Disbursements (Cash) by J. W. Van Valkenburg, Receiver of the Lebanon Springs Railroad Company.

Equipment, cars, engines, freight cars, etc		$8,042 50
Station agents and connecting roads		53,565 44
John W. Van Valkenburg		22,452 91
Overcharge on freight		1,541 08
Current bills	$268,419 44	
Employés	179,981 02	
E. R. Potter	1,500 00	
M. T. Seymore & Co	8,633 05	
G. Brush & Co	3,500 00	
H. E. Gardener	1,493 70	
P. and Packer	1,437 39	
		464,964 60
Receiver's certificates, 1st issue		19,200 00
Interest		21,487 54

Judgments:		
M. S. Doolittle	$910 00	
A. G. Niles	195 31	
		1,105 31
Legal expenses		7,421 77
Discount, &c., C. T. F. S.		2,395 00
W. V. Reynolds		629 32
Central National bank		1,500 00
Unclaimed amounts—pay-rolls		106 35
		$604,411 82

For the distribution of the above items, $464,964.60, see separate statement.

432 STATEMENT "C."

Total Distribution of Current Bills and Pay-rolls.

Land; land damages fences and gates	$33,295 07
Telegraph line	901 44
Grading and masonry	16,892 16
Bridges	14,152 87
Superstructure; not including rails and ties	36,256 85
Passenger and freight stations	9,652 00
Ties	38,293 17
Iron rails	86,317 18
Engines and cars; house and machine shops	7,804 93
Locomotives	21,286 44
Passenger and baggage cars	12,659 22
Freight cars	7,979 56
Hand and rubble cars	680 65
Contingents	1,014 60
Arrears of taxes	888 92
Bolts, nuts and spikes	5,218 02
Real estate	75 00
Total construction account	$292,368 08
Repairs, road-bed	$26,491 38
" bridges	311 52
" buildings	300 34
" fences; fences and gates	62 00
" engines and tenders	3,711 93
" cars	6,545 45
" tools and shops	442 13
Incidental expenses at shops	515 96
General office expenses	1,970 31
Agents and clerks	27,778 86
Handling freight	7,955 56

	Porters, watchmen and switchmen.	1,454 97	
433	Fuel, water and station attendance.	371 53	
	Conductors, baggagemen and switchmen	17,595 13	
	Engineers and firemen	15,118 68	
	Engine fuel	29,412 73	
	Oil and waste	2,393 36	
	Loss and damage to goods	479 71	
	Damages for injuries to persons	147 60	
	Damages to property in transportation	120 50	
	Station fuel	355 64	
	Taxes	760 89	
	General supplies	17,273 45	
	Hire of cars	4,284 38	
	Rents	12,136 86	
	Shovelling snow	2,235 53	
	Printing and advertising	3,323 95	
	Train supplies	534 57	
	Track supplies	457 75	
	Contingencies	3,844 72	
	Total expense account	$188,387 50	
	Total construction account	$292,368 08	
	Total expense account	188,387 50	
			$480,755 58
	Less for bills unpaid June 30, 1883		15,790 98
	As per statement of disbursements		$464,964 60

434 STATEMENT "D."

Account of Receiver's Certificates, 2d Issue, $350,000.

	Amount of cash received from E. Crane as per statement of his account	$180,000	
	Same as above	34,500	
			$214,500 00
	From Mrs. E. K. Carter		1,200 00
	" E. W. Bond, pres., etc., through J. W. Van Valkenburgh, receiver		8,075 00
	Total cash received		$223,775 00
	Paid M. Sackett (par value)	$1,000 00	
	" H. A. Tilden " "	3,000 00	
	" H. A. Tilden (net)	6,330 00	
	" H. A. Tilden (par)	1.000 00	
			11,330 00
	" J. W. Van Valkenburgh, net		31,500 00

Paid Crane $16,000 on account; $14,000 old certificates, and cash advanced by him, net		14,560 00
Total, not including discount		$281,165 00
Discount to Crane	$1,440 00	
" "	27,600 00	
" Tilden	670 00	
" Mrs. E. K. Carter	300 00	
" E. W. Bond, president	1,425 00	
" J. W. Van Valkenburgh	3,500 00	34,935 00
Total		$316,100 00
Amount due from Crane, as per statement		33,900 00
Total		$350,000 00

435 STATEMENT "E."

Edward Crane, Esq., of New York, in account with John W. Van Valkenburgh, receiver of the Lebanon Springs R. R. Co., Dr.

1881. DR.

May 10th, to $300,000, receiver's certificates	$300,000	
Less amount subsequently returned	24,000	
	$276,000	
Less 10 per cent. discount, as per agreement	27,600	
Amount to be discounted for in cash		$248,400 00

1881. CR.

May 10th, by amount deposited with the Pacific Nat'l Bank of Boston	$155,000	
May 11th, by draft on New York	18,500	
May 11th, by draft on New York	6,500	180,000 00
		$68,400 00
Sept. 15th. By cash	$5,000	
Oct. 14th. "	2,000	
Oct. 21st. "	3,000	
Oct. 22d. "	2,000	
Oct. 26th. "	3,000	
Nov. 30th. "	1,500	
Dec. 13th. "	1,500	
Dec. 28th. "	5,000	
Dec. 29th. "	2,500	
Dec. 30th. "	3,000	

436 1882.

Feb. 28th.	By cash	1,000	
March 4th.	"	3,000	
April 27th.	"	1,000	
May 13th.	"	1,000	
			34,500 00
	Balance		$33,900 00
	For interest on the above account as computed and entered in journal to June 30th, 1883.....		5,572 75
			$39,472 75

STATEMENT "F."

J. W. Van Valkenburgh.

1880.			April 5.	To cash...	$150 00
Nov. 14.	To cash...	$25 00	April 16.	" ...	150 00
Nov. 30.	" ...	30 00	April 26.	" ...	200 00
Dec. 6.	" ...	22 91	May 3.	" ...	50 00
Dec. 11.	" ...	125 00	May 23.	" ...	100 00
1881.			May 31.	" ...	155 00
Jan. 4.	" ...	100 00	June 1.	" ...	150 00
Jan. 4.	" ...	50 00	June 5.	" ...	150 00
Jan. 13.	" ...	100 00	June 15.	" ...	100 00
Jan. 17.	" ...	25 00	June 26.	" ...	700 00
Mar. 31.	" ...	30 00	June 26.	" ...	300 00
May 2.	" ...	100 00	June 26.	" ...	300 00
May 9.	" ...	75 00	June 27.	" ...	300 00
May 12.	" ...	500 00	437		
May 13.	" ...	200 00	June 28.	" ...	600 00
May 13.	" ...	200 00	June 23.	" ...	100 00
May 17.	" ...	165 00			$22,452 91
June 7.	" ...	5,000 00	1880.		
July 1.	" ...	5,000 00	Dec. 31.	To receiver's certificates, 1st issue.	9,000 00
Aug. 23.	" ...	500 00	Dec. 31.	1st issue ..	200 00
Sept. 15.	" ...	5,000 00	1881.		
1882.			Dec. 31.	2d issue...	35,000 00
Feb. 23.	" ...	25 00	Less 10 per ct. dis. 3,500.....		31,500 00
Mar. 10.	" ...	200 00			$63,152 91
Mar. 16.	" ...	25 00	Bal. charged to J. W. Van Valkenburgh.		$38,870 72
Mar. 20.	" ...	100 00	1880.		
April 4.	" ...	50 00	Oct. 27.	By cash...	3,000 00
Aug. 1.	" ...	500 00			
Aug. 25.	" ...	100 00			
Sept. 8.	" ...	50 00			
1883.					
Jan. 30.	" ...	100 00			
Feb. 2.	" ...	200 00			
Mar. 3.	" ...	250 00			
April 5.	" ...	100 00			

Nov.	1.	By cash...	$436 67	1882.			
Nov.	9.	" ...	100 00	Jan.	16.	By cash...	$1,000 00
Nov.	11.	" ...	100 00	Mar.	31.	" ...	500 00
Nov.	30.	" ...	200 00	April	17.	" ...	3,000 00
Dec.	3.	" ...	27 66	May	15.	" ...	2,000 00
Dec.	6.	" ...	2,000 00	1883.			
Dec.	10.	" ...	3,000 00	July	5.	" ...	2,000 00
Dec.	16.	" ...	2 76	Dec.	9.	" ...	1,000 00
Dec.	31.	" ...	395 00	Dec.	27.	" ...	3,000 00
1881.				April	21.	" ...	500 00
Jan.	26.	" ...	85 30	May	10.	" ...	230 00
Feb.	4.	" ...	100 00				$24,282 19
April	2.	" ...	104 80			Balance.....	38,870 72
Oct.	14.	" ...	1,000 00				$63,152 91
Dec.	24.	" ...	500 00				

Statement of Gross Earnings from October 27th, 1880, to June 30th, 1883, Inclusive.

October 27th, 1880, to September 30th, 1881.

Passenger earnings.....	$14,983 89
Freight earnings.....	53,033 40
Express earnings.....	691 66
Mail service.....	2,811 01
Car service	
Express baggage	
Total	$71,519 96

438 *Statement of Gross Earnings from October 27th, 1880, to June 30th, 1883, Inclusive.*

October 1st, 1881, to September 30th, 1882.

Passenger earnings.....	$22,837 37
Freight earnings	16,844 35
Express earnings.....	750 00
Mail service.....	3,212 52
Car service	196 31
Excess baggage	32 38
	$93,872 93

Statement of Gross Earnings from October 27, 1880, to June 30, 1883.

October 1, 1882, to June 30, 1883.

Passenger earnings.....	$12,161 73
Freight earnings	57,034 74
Express earnings	562 50
Mail service.....	2,409 39
Car earnings.....	123 56
Excess baggage	39 02
Total.....	$72,330 94

Statement of Gross Earnings from October 27th, 1880, to June 30th, 1883, Inclusive.

Recapitulation.

From Oct. 27th, 1880, to Sept. 30th, 1881		$71,519 96
From Oct. 1st, 1881, to Sept. 30th, 1882		93,872 93
From Oct. 1st, 1882, to June 30th, 1883		72,330 94
Total earnings		$237,723 83
Total disbursements as per Statement "A"		$604,411 82
Less cash on account of receiver's certificates, as per Statement "D"	$223,775 00	
439 Less cash paid J. W. Van Valkenburgh, as per Statements "B" and "F"	22,452 91	
		246,227 91
Total disbursements from the business of the road		$358,183 91

The receipts and disbursements being even, as per Statement "A."

Judgment-roll.

Supreme Court.

MARVIN SACKETT
against
RUSSEL C. ROOT and Others.

COLUMBIA COUNTY, *ss:*

Hugh W. McClellan, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that no answer or demurrer herein has been served on the plaintiff's attorneys by the defendants, The New York, Boston and Montreal Railway Company, or Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company.

H. W. McCLELLAN.

Sworn to before me this 8th day of October, 1884.

GEO. McCLELLAN,
Notary Public.

440 STATE OF NEW YORK, *City and County of New York,* } *ss:*

Joseph Child, being duly sworn, says that he is more than twenty-one years of age; that on the 23d day of September, 1880, at the city of New York, to wit, the Union Club room, corner of Fifth avenue and Twenty-first street in said city, he served the annexed summons and complaint, affidavit and notice of motion on

aniel Butterfield, one of the defendants therein named, by deliver-
g to and leaving with him personally copies thereof; that he
iew the person so served to be the person mentioned and de-
ribed in the summons as Daniel Butterfield, one of the defend-
nts therein.

JOSEPH CHILD.

Sworn to this 25th day of September, 1880, before me—
B. J. DOURAS,
Notary Public, N. Y. Co.

41 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
USSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

To the above-named defendants:

Take notice that upon the affidavit and the verified complaint, copies of which are annexed, and upon all the papers filed or served on you in this action, the undersigned will move the court, at a special term to be held at the city hall, in the city of Kingston, in the county of Ulster, on the 1st day of October, 1880, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order that an injunction issue herein, according to the prayer of the complaint, and for the appointment of a receiver of the property, effects, and franchises which were of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company in this State, and were purchased by James C. Hull, conveyed by said Hull and Charles G. Lincoln to the defendant, The New York, Boston and Montreal Railway Company, as alleged in said complaint, with the usual directions, and for such other relief as may be just.

Dated ——.

Yours, &c.,
McCLELLAN & BROWN,
Attorneys for Plaintiff, Chatham Village, Columbia County, N. Y.

442 CITY AND COUNTY OF NEW YORK, *ss:*

William L. Finn, being duly sworn, says that he is over twenty-one years of age and resides in the city of New York, and that on the 7th day of September, 1880, at the city of New York, he served the summons in this action, together with a copy of the complaint, affidavit, and notice of motion hereto annexed, on The Harlem Extension Railroad South Coal Transportation Company, defendant in this action, by delivering a copy of said summons and said copy

complaint to Russell C. Root, to me known to be the president of said The Harlem Extension Railroad South Coal Transportation Company, personally, and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as defendant in this action.

WM. L. FINN.

Sworn to before me this 9th day of September, 1880.

A. M. CARD,
Notary Public (59), *N. Y. Co.*

CITY AND COUNTY OF NEW YORK, *ss:*

William L. Finn, being duly sworn, says that he is over twenty-one years of age and resides in the city of New York, and that on the 7th day of September, 1880, at the city of New York, he served the summons in this action, together with a copy of the complaint, affidavit, and notice of motion therein mentioned on Russell C. Root, defendant in this action, by delivering a copy of said summons and said copy complaint to such defendant personally, and leaving the same with said Root; he further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant in this action.

WM. L. FINN.

Sworn to before me this 9th day of September, 1880.

A. M. CARD,
Notary Public (59), *New York County.*

443 STATE OF NEW YORK, *City and County of New York,* } *ss:*

William L. Finn, being duly sworn, says: That he is over twenty-one years of age; that on the 7th day of September, 1880, at the city of New York, he served the annexed summons and complaint, affidavit and notice of motion, on the New York, Boston and Montreal Railway Company by delivering copies thereof to John Q. Hoyt, vice-president of said company, defendant therein named, he being acting manager thereof, by delivering to and leaving with said Hoyt personally a copy thereof; that he knew the person so served to be the person mentioned and described in the summons as the defendant therein.

WM. L. FINN.

Sworn to this 9th day of September, 1880, before me—

A. M. CARD,
Notary Public (59), *New York County*

4 At a special term of the supreme court of the State of New York, held at the city of Albany, on the 31st day of August, 880.

Present: Hon. T. R. Westbrook, justice.

n the Matter of the Petition of MARVIN SACKETT for Leave to Join Daniel Butterfield, a Receiver Appointed by this Court, as Defendant in an Action Therein.

On reading and filing the petition of Marvin Sackett, and his roposed complaint in an action in this court, which he proposes to mmence, both duly verified, for an order that petitioner have ave to join Daniel Butterfield, as receiver of the New York, Boston nd Montreal Railway Company, as defendant in an action to be rought by him, as therein set forth; on motion of H. W. McClelan, of counsel for the petitioner, Marvin Sackett, it is ordered that id petitioner, Marvin Sackett, have leave to join Daniel Butterld, as receiver of the New York, Boston and Montreal Railway ompany, as defendant in the action to be brought by him, on the rounds mentioned in the said petition and set forth in the said mplaint.

Enter in Rensselaer county.

T. R. WESTBROOK.

45 To Daniel Butterfield, receiver of the New York, Boston and Montreal Railway Company:

Take notice of an order, of which the foregoing is a copy, made nd entered as herein required.

Dated August 31st, 1880.

Yours, &c., McCLELLAN & BROWN,
Attorneys for the Petitioner.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
USSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH COAL Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

o the above-named defendants:

Take notice that upon the affidavit and the verified complaint, opies of which are annexed, and upon all the papers filed or served n you in this action, the undersigned will move the court, at a pecial term to be held at the city hall, in the city of Kingston, in he county of Ulster, on the 18th day of September, 1880, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be

heard, for an order, that an injunction issue herein, according
446 to the prayer of the complaint, and for the appointment of a receiver of the property, effects and franchises which were of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company in this State, and were purchased by James C. Hull, conveyed by said Hull and Charles G. Lincoln to the defendant, The New York, Boston and Montreal Railway Company, as alleged in said complaint, with the usual directions, and for such other relief as may be just.

Dated August 31st, 1880.

Yours, &c., McCLELLAN & BROWN,
Attorneys for Plaintiff, Chatham Village, Columbia County, N. Y.

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

COUNTY OF COLUMBIA, *ss.*:

Marvin Sackett, being duly sworn, says: That he is the plaintiff named in the above-entitled action, and verified the same.
447 That he has actual knowledge of the truth of said complaint from examination of the writings, records or copies thereof of the various organizations, transfers, and of the legal proceedings and records of conveyances therein referred to; he has personal knowledge of the taking possession of the said railroad by said Root and said transportation company, and of the acts and circumstances attending the same, and of the manner of its management and its present condition as compared with its former condition, from personal inspection and examination of the same, and from his personal acquaintance with the same ever since it was constructed, he living on the line of said railroad and frequently being a passenger thereon, and he knows of the lack of any agreement on the part of said Root to pay anything for the use of said road, or of any agreement to surrender the possession of said road back, from reading a copy of an answer served in an action in the supreme court, wherein said transportation company is the defendant, verified by said Root as its president, and of his intention to continue in possession of the said road until the event of its incorporation by its bondholders, as alleged in said complaint from a letter written after an interview, and of an interview and conversation by Mr. Bloodgood, the person who principally acted in putting Mr. Root in possession of the said railroad; and that from all deponent's examinations and knowledge and information and belief, deponent has entire confidence in

e substantial truth of every material allegation in the said com-
aint.

MARVIN SACKETT.

Sworn to before me this 30th day of August, 1880.
G-ORGE McCLELLAN,
Notary Public.

48 Supreme Court, County of Rensselaer.

MARVIN SACKETT, Plaintiff,
against
USSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

'o the above-named defendants:

You are hereby summoned to answer the complaint in this action, nd to serve a copy of your answer on the plaintiff's attorneys within wenty days after the service of this summons, exclusive of the day f service, and in case of your failure to appear or answer judgment ill be taken against you by default for the relief demanded in the omplaint.

McCLELLAN & BROWN,
Plaintiff's Attorneys.

Office and post-office address, Chatham village, Columbia county, New York.

449 Supreme Court, County of Rensselaer.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

The plaintiff Marvin Sackett, in behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who hold any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit, complains against Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, defendants, and alleges as and for his complaint the following, constituting his cause of action:

That prior to the times hereinafter mentioned, the Lebanon Springs Railroad Company was a duly organized corporation, formed under and pursuant to the act of the legislature of the State of New York, entitled "An act to authorize the formation
450 of railroad corporations, and to regulate the same," passed April 2d, 1850, and the acts amendatory thereof, and as such, had all the rights and franchises of a railroad corporation of, in and to the several pieces and parcels of land constituting the track and roadway of a railroad, starting from Chatham Four Corners, now the village of Chatham, in Columbia county, New York, and extending northerly and easterly to the eastern boundary of this State, in the town of Hoosick, in the county of Rensselaer, New York, and extending from thence to the village of Bennington, in the State of Vermont, together with all the rails, bridges, fences, stations, station-houses, buildings, and other structures thereon and all the appurtenances thereunto belonging, and the rents, incomes and profits thereof, and with all the powers, rights and franchises of a railroad corporation. That thereafter as such corporation, on or about the 1st day of July, 1861, it duly issued and sold the bonds of the said company to the amount of two millions of dollars or thereabouts, to individuals and to towns, the greater part thereof within this State.

That to secure the payment of the said bonds the said Lebanon Springs Railroad Company, on or about the 1st day of July, 1867, duly mortgaged all their property and franchises to the Union Trust Company of New York, for an amount equal to the amount of their bonds so issued and disposed of in trust to secure the payment of the said bonds, as by reference thereto will more fully appear.

That the said mortgage was at the time of the foreclosure and sale hereinafter mentioned the first mortgage upon the property and franchises of the said Lebanon Springs Railroad Company, and the said bonds bore interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, and the principal thereof was payable thirty years after the date thereof, but by a provision thereof the whole principal
451 became due in the year 1870, by reason of non-payment of interest thereon.

That the plaintiff is holder and owner of the said bonds of the said company to the amount of eight thousand seven hundred dollars. The towns within this State through which said road runs being owners of some of said bonds of the face value of two hundred and forty-six thousand dollars.

The town in which plaintiff resides, owning one hundred thousand dollars thereof. This is not counting the interest upon any of said bonds, none having been paid thereon since 1870.

And plaintiff further shows that thereafter certain proceedings were had, pursuant to the statute of this State in such case made and provided, the[object and purpose of which was to effect a consolidation of the Lebanon Springs Railroad Company and the Bennington and Rutland Railroad Company; and, to effectuate such purpose, an agreement to consolidate was executed by said two com-

panies, dated December 31st, 1869, by which it was agreed to consolidate said railroad companies under the name of the Harlem Extension Railroad Company, which company assumed the payment of the aforesaid bonds, with interest thereon, after January 1st, 1870. That from the time of said agreement the said railroad was run, operated and occupied a portion of the time by lessees until on or after the 25th day of January, 1873.

That on or about the 22d day of February, 1872, the said Union Trust Company, as trustees as aforesaid under said mortgage, for default in the payment of moneys secured thereby, by an action in the supreme court of this State, commenced the foreclosure of the said mortgage, given as aforesaid by the said Lebanon Springs Railroad Company, wherein The Lebanon Springs Railroad Company, The Harlem Extension Railroad Company, William Butler Duncan and James B. Hodskins were defendants, which proceedings
452 were continued to judgment; and on the 25th day of January, 1873, the entire property of both of said companies within this State was, by a referee duly appointed by the court in that behalf, duly sold under said judgment at Greenbush, in the county of Rensselaer, and conveyed to James C. Hull for the nominal sum of $100,000, for the use and benefit of the aforesaid bondholders, no part of which purchase price has been paid, as plaintiff states on information and belief, said Hull being a clerk or employé of William Butler Duncan, or of the copartnership firm of Duncan, Sherman & Co.; said Duncan, as one of said firm, owning a large amount of said bonds, and acting for and in behalf of all of said bondholders.

That at about the same time, proceedings had been had in the court of chancery, in the State of Vermont, by which all the property and franchises of the said company in said State had been sold under mortgage foreclosure proceedings to Charles G. Lincoln, a clerk or employé of one Trenor W. Park, another holder of said bonds, likewise for but a nominal sum, and for the use and benefit of all the said bondholders. And thus said Hull and Lincoln became the purchasers, and received the deeds on such foreclosure sale of the whole property of the said corporation in this State, and in the State of Vermont, in reality and fact, as agents of the bondholders as aforesaid, and for and in behalf of the owners of the aforesaid bonds of the Lebanon Springs Railroad Company.

That prior to said mortgage sale, and in January, 1873, proceedings had been instituted, and which were believed to have been effectually executed, whereby the said Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company had been consolidated under the name of the New York, Boston and Montreal Railway Company, and, in order to avoid any risk or loss to the bondholders under said two-million mortgage, and in contemplation of the last-mentioned consolidation,
453 said Hull and Lincoln, nominal purchasers as aforesaid, made, executed and delivered to said William Butler Duncan and Trenor W. Park, who were the representatives and agents of the said bondholders, a mortgage upon all the property so as

aforesaid purchased by them, for the sum of $5,000,000, and cotemporaneous therewith, and in order to effectuate said consolidation, conveyed the whole of the property so purchased and mortgaged by them to the said New York, Boston and Montreal Railway Company, subject to the mortgage so given as aforesaid to said Duncan and Park, for these bondholders as aforesaid.

That said railroad, pending the actual consolidation, continued to be run by said Duncan and Park, as trustees, and in the interest of the bondholders aforesaid, till on or about the 3d day of November, 1873, when, by an instrument in writing, duly executed by the said Duncan and the said Park, and the said New York, Boston and Montreal Railway Company, a copy whereof is hereunto annexed, marked Schedule A, and forms part of this complaint, the said railroad and all its appurtenances and property were leased to the Central Vermont Railroad Company.

That the foreclosures, purchases and the lease were made for the sole benefit and advantage of the owners of the aforesaid bonds under said two-million mortgage.

That the said railroad property and effects were never in the actual possession or custody of the New York, Boston and Montreal Railway Company, and that in all the agreements of consolidation the indebtedness of the said bonds to the owners thereof was assumed by the several companies respectively.

That under said agreement contained in Schedule A, the Central Vermont Railroad Company occupied and operated the said railroad and property until on or about the 20th day of August, 1877, when, under said agreement contained in Schedule A, they surrendered the said road and property back again to said Duncan
454 and Park, from whom they received the same, who were still acting for and in behalf of the said bondholders. That from thence the said railroad was not in operation until the time hereinafter mentioned when the defendant, Russell C. Root came into the possession thereof; that during all this time the said New York, Boston and Montreal Railway Company was notoriously and hopelessly insolvent, which insolvency culminated in the due appointment by the supreme court of Daniel Butterfield as receiver of its property and effects.

That on or about the 24th day of August, 1877, said Duncan and Park, or one M. H. Bloodgood and A. B. Gardner, or one or more of said persons, acting for and in the name of the owners of the Lebanon Springs Railroad Company's bonds, or assuming so to act, took formal possession of all the said real estate and railroad property and effects, in the name of and for the benefit of the said bondholders, the said railroad lying unoperated or run, and said person or persons allowed the defendant, Russell C. Root, to run and operate the same, without, as said Root alleges and claims, any agreement, covenants or stipulation in regard to his occupation whatever, as plaintiff states on information and belief, and without any agreement to pay anything for the same, and as plaintiff states, on information and belief, said Root announces and gives out that he expects and intends to operate and continue in the management of

said railroad until a corporation may or shall be organized which shall become vested with the title thereto, and authorized to possess and operate the same.

That said Root so occupied said railroad property until on or about the 27th day of November, 1877, when a company was organized under the general manufacturing act and acts of this State, of which said Root was and still is the president, by the name of "Harlem Extension Railroad South Coal Transportation Company,"
with a capital of $2,000, which was soon thereafter nominally
455 given possession thereof by said Root, its president, and from thence hitherto, the said last-named company have claimed to occupy and use the whole of the said property and effects, being the property of the plaintiff and the others, holders of the bonds of the Lebanon Springs Railroad Company. That said railroad property is now and for a long time past has been in constant use, and in consequence of entire neglect to do any more repairs than are absolutely necessary to allow it to be used at all, without the supplying of new material in such repairs, and the removal in some places of side tracts for the purpose of using the old material thereof in repairs upon the direct single track, thus disabling and by non-use allowing to be wrecked and destroyed the said tracks, turnouts and turn-tables upon the line of said railroad, all of its fixtures and appurtenances being nearly worn out and these deficiencies not being supplied, and its value continually depreciating more and more the longer such use continues, and all this without a farthing being paid to any person by the party occupying said premises or by any other person.

That on or about the 29th day of November, 1879, as plaintiff states, upon information and belief, a portion of the said property so occupied as aforesaid, was sold by the county treasurer of the county of Rensselaer, for non-payment of taxes thereon, and was purchased by some person or persons to the plaintiff unknown; annexed, marked Schedule B, which forms part of this complaint, is a copy of the notice under which said property was sold, and that unless soon redeemed, the said property sold will be entirely lost to the present owners thereof.

Whereby there is continually loss being sustained by the real owners of said property, the plaintiff and others, bondholders as aforesaid.

That on the contrary, said railroad, by any fair and honest and prudent management, might and could and would pay something
upon the said bonds, keep the said railroad improving, and
456 pay all expenses and taxes in so doing, thus providing something to pay upon said bonds, no payments having been made thereon for more than ten years last past, and said railroad property being the only source from which any payments thereon can ever be realized, and that unless relief can be obtained in this court, the said property will be rendered worthless, and the plaintiff and the others, bondholders, remediless in the premises.

That in addition to individual interest and benefits it is very essential to the welfare and prosperity of the towns through which

said railway is constructed, owners of bonds, as aforesaid, that the same should be maintained in good condition and efficiently operated. That for this purpose the bondholders to a large extent, desire to organize a corporation, pursuant to the laws of this State, for the purpose of operating and maintaining said railway and franchises, but as plaintiff is advised and believes, there is no power upon the part of said towns to become parties to or to assent to such an organization. That experience has shown it is impracticable to operate and maintain said road efficiently by any unincorporated company on behalf of the bondholders. That the said bonds have little or no market value. That it is very desirable that the said property and franchises be sold, the plaintiff believing and alleging that a much larger sum can be obtained and realized by the bondholders for their property on a distribution of the proceeds of a sale of the railroad and franchises than can be obtained for the bondholders by a sale of their bonds.

Wherefore the plaintiff demands that it may be adjudged:

First. That the New York, Boston and Montreal Railway Company have no title to the said Lebanon Springs Railroad Company or its franchises or property as against the holders of the bonds so as aforesaid issued under said mortgage for the $2,000,000,
457 and in whose behalf and for whose benefit said railroad company was purchased by said James C. Hull on the foreclosure sale as aforesaid, and that as against the said New York, Boston and Montreal Railway Company and the receiver as aforesaid of said company, the said bondholders are entitled to hold and possess said railroad company, its property and its franchises.

Second. That said Russell C. Root and said Harlem Extension Railroad South Coal Transportation Company may be adjudged to have no right or interest to the possession of the said railroad property; that a proper and fit person may be appointed as receiver of said company, purchased on the aforesaid foreclosure sale, and its franchises, to operate and maintain said railroad company, and to hold and reserve its profits and franchises for the benefit of the bondholders as aforesaid.

Third. That an injunction be granted that the defendants and each and every of them and all and every person acting by authority of any or either of them be restrained from interfering with the said railroad property in any way or manner, and from disposing of the same.

Fourth. That a receiver of the whole of the said property, railroad and franchises may be appointed by the court with usual powers and duties of receivers in like cases, until such time as said property and franchises may be sold under a judgment in this action, or a company or corporation formed by the bondholders to run and operate the same.

And lastly, that said railroad and franchises may be sold for the benefit of the bondholders and distribution made thereof, and for such other relief in the premises as to the court shall seem just.

McCLELLAN & BROWN,
Attorneys for Plaintiff, Chatham Village,
Columbia County, New York.

458 STATE OF NEW YORK, } ss:
County of Columbia, }

Marvin Sackett, the plaintiff named in the foregoing complaint, being duly sworn, says: That he has read the foregoing complaint and knows the contents thereof, and the same is true to his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

MARVIN SACKETT.

Sworn to before me this 30th day of August, 1880.

GEO. McCLELLAN,
Notary Public.

The indenture, made and executed this third day of November, A. D. 1873, by and between the New York, Boston and Montreal Railway Company, a corporation duly incorporated under and in pursuance of the laws of the State of New York, the party of the first part to these presents, and William Butler Duncan, of the city of New York, and Trenor W. Park, of the State of Vermont, the parties of the second part hereto, and the Central Vermont Railway Company, a corporation duly incorporated under the laws of the State of Vermont, the party of the third part hereto, witnesseth:

That whereas, that certain railroad company heretofore and lately known as the Harlem Extension Railroad Company, and owning and operating its railroad from the town of Rutland, in the State of Vermont, to the village of Chatham Four Corners, in the State of New York, and from the village of North Bennington, in the State of Vermont, to the New York State line, have been, together with certain other railroads duly and in pursuance of law consolidated into the New York, Boston and Montreal Railway Company, the party of the first part hereto, which last-named
459 company is now the owner of the said line of railroad and its franchises, subject to the lien of the mortgage hereinafter next mentioned.

And whereas, the said parties of the second part hereto have a good, valid and subsisting mortgage for the principal sum of $5,000,000 upon the said Harlem Extension railroad and its appurtenances and every part thereof, which said mortgage fell due on July 1st, A. D. 1873, and a large portion of the money secured thereby is yet overdue and unpaid.

And whereas, the parties of the second part have agreed with the said party of the first part to extend, upon certain conditions, the time of full payment of said mortgage to the 1st day of July, A. D. 1874.

And whereas, also, the said parties of the second part are the owners of all and singular the rolling stock of every kind and description whatsoever, now used or operated on said Harlem Extension railroad, with the exception of certain cars belonging to the United States Rolling Stock Company, and so marked.

And whereas, also, the said parties of the second part are the

absolute owners of all fuel and other supplies of every nature, and the shop, stock and tools of every name and description, and all other personal property of every kind and character, now upon or along the line of and designed for use in operating said Harlem Extension railroad.

And whereas, also, the said parties of the second part have the actual possession and control of the said Harlem Extension railroad and all and every of its appurtenances, and said rolling stock and other personal property, and the said road is now being run and operated by them.

Now, therefore, it is hereby agreed by and between the said parties of the first, second and third parts hereto, as follows, that is to say:

That the said parties of the first and second parts, for and
460 in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part of the party of the third part, its successors and assigns, to be paid, kept and performed, have leased, demised and to farm let, and by these presents do lease, demise and farm let (according to their respective interests, as above described, in the property to be hereby demised) unto the said party of the third part, its successors and assigns, all that line of railroad heretofore and lately known as the Harlem Extension railroad, extending from the town of Rutland, in the State of Vermont, to the village of Chatham Four Corners, in the State of New York, and from the village of North Bennington, in the State of Vermont, to the New York State line in the direction of and on the line to Troy, and all the said rolling stock thereon belonging to said parties of the second part, and now used in operating said railroad, all shops, house buildings, depots, stations and appurtenances of every kind, character and nature whatsoever. To have and to hold the said above mentioned and described premises and property, with the appurtenances, unto the said party of the third part, its successors and assigns, from the 1st day of November, 1873, for and during and until the time when the party of the first part, its successors or assigns, puts in operation its line of railway from High Bridge, on the Harlem river, State of New York, to the said village of Chatham Four Corners, connecting with the line of said Harlem Extension railroad at that place, and fully makes the payments hereinafter and in the manner provided to be made by it, its successors or assigns, to the party of the third part, its successors or assigns, and then fully to be complete and ended. Yielding and paying therefor unto the parties of the first and second parts, their successors, heirs or assigns, in the order and manner hereinafter provided, yearly and every year during the time and term hereby granted, the yearly sum or rent of fifteen per centum of
the annual gross receipts and earnings of the said Harlem
461 Extension railroad, in equal half-yearly payments, viz., on the 1st day of May and November, in the year 1874, and in each year thereafter during said term, and yielding and paying therefor at the expiration or other sooner determination of this lease, in the same ratio, for any portion of a half year that may have expired at

the time when this lease is determined. And also yielding and paying therefor on the 1st day of November, 1874, and in each year thereafter during the term, an additional one per centum of the annual gross earnings of the said road for every $36,000 increase in the said annual gross earnings over and beyond the yearly gross sum of $360,000. And also yielding and paying therefor at the expiration or sooner determination of this lease this additional one per centum, in the same ratio, for any portion of a year that may have expired at the time when this lease is determined. But not in any event shall the rent exceed thirty per centum of the gross earnings.

Provided always, nevertheless, that if the rent above reserved, or any part thereof (after making the deductions hereinafter specified, which then have accrued), shall be behind or unpaid on any day of payment whereon the same ought to be paid as aforesaid, for the space of sixty days, then and from thenceforth it shall and may be lawful for the said parties of the second part, their heirs or assigns, into and upon the said demised premises and property, and every part thereof, wholly to re-enter; and the said parties of the second and first parts hereto, their heirs, successors or assigns (according to their respective interests as above described in the property demised), the same to have again, repossess and enjoy, as in their or its first and former estate, anything herein contained to the contrary notwithstanding.

It is further stipulated, covenanted and agreed, by and between the parties hereto, as follows, viz:

First. That the said party of the third part hereto, its successors or assigns, shall and will, during the continuance of
462 this lease, perform all the duties and obligations imposed by law upon the party of the first part, in respect to running and operating its road, including the making of all reports required by law, and shall and will run and operate said railway at its or their own proper expense, costs and charges in accordance with law, and at their own risk in every respect whatever, and shall and will at their own proper costs and charges (except as hereinafter provided), keep the same in good order and repair, and so redeliver the same at the expiration or other sooner determination of this lease, ordinary wear and tear only excepted, and shall and will save and keep harmless the parties of the first and second parts, their successors, heirs and assigns, of and from all loss or damage which they or either or any of them may sustain in consequence of any acts or omissions of the party of the third part, its successors or assigns, in operating said road during the continuance of this lease.

Second. That the said party of the third part, its successors or assigns, shall and will, at its or their own proper costs and charges, bear, pay and discharge all such taxes, duties and assessments (including assessments for highway labor) of every kind and nature as shall or may, during the said term hereby granted, be charged, assessed or imposed upon the said demised premises and property.

Third. That the said party of the third part, its successors or assigns, shall and will purchase of the parties of the second part, their

heirs or assigns, all their said supplies, shop stock and tools, along and upon the said road, at the time this lease goes into effect, and pay for the same within sixty days thereafter as per inventory and valuation, to be made and agreed on by the parties of the second and third parts hereto, and in case they shall fail to agree, then the same shall be made by three disinterested persons, one
463 of whom is to be chosen by each of the said parties of the second and third parts, and the other to be selected by the two so chosen.

Fourth. That the party of the third part, its successors or assigns, shall and will well and truly pay, or cause to be paid, unto the said parties of the second part, their heirs or assigns, out of and as a part of the rent herein reserved, and for the use or rent of the said rolling stock belonging to the parties of the second part, at present on said road, the sum of $875 each month, to be paid unto the said parties of the second part, their heirs or assigns, and the same shall be a charge against the party of the first part, its successors or assigns, and shall be first paid by the party of the third part, its successors or assigns, out of the rents falling due, and as fast as the same fall due under this lease and hereinabove provided, to be paid by the party of the third part, its successors or assigns.

Fifth. That the said party of the third part, its successors or assigns, shall and may at all times during the term lay down and put in such new iron rails and tracks, or reroll the old rails and lay them, as may, in the judgment of the party of the third part, be required to place, maintain and keep in good and substantial repair and condition the said railroad, and shall and may dispose of the old iron and rails at the best advantage, if it or they decide, or so much as they decide not to reroll; and the said party of the third part, its successors or assigns, shall and may, as occasion may require during the term, erect and put in any further permanent repairs. structures and improvements along and upon said road, as in their judgment may be requisite and necessary to keep and maintain it in good running order and substantial repair and condition, such as depots, station buildings, bridges, bridge abutments and such like; and shall and may also build and finish the erection of the freight depot, now in the process of erection, at the
464 said town of Rutland; and the said party of the third part, its successors and assigns (after first making the payments to the parties of the second part, their heirs or assigns, specified in article 4th), shall and may charge and offset the cost of the respective items mentioned in this article, viz., the cost of new rails, or rerolling old rails, after deducting the price obtained for all old rails sold, and the cost of making any permanent repairs or improvements, and erecting the said Rutland freight depot, against the rent hereinbefore reserved to be paid by the party of the third part, its successors and assigns; and the same shall and may be deducted by the party of the third part, its successor- or assigns, from the said rent falling due, and as fast as the same falls due under this lease, and the outlays and expenditures contemplated and provided for in this article shall be a first charge upon the rent herein stipulated

to be paid, after paying the parties of the second part, their heirs and assigns, said rent for the use of the rolling stock as aforesaid.

It is further stipulated, covenanted and agreed by and between the parties hereto, that at the expiration of the term herein granted, and before the party of the first part, its successors or assigns, shall demand or take possession, as a condition precedent to obtaining possession of the said road, premises and property herein demised, the said party of the first part, its successors and assigns, shall well and truly pay, or caused to be paid, unto the said party of the third part, its successors or assigns, any sum of money or excess that may be due to the said party of the third part, its successors or assigns, for the use of rolling stock, as paid for and specified in article 4 above, for iron furnished or rerolled, for other permanent repairs or improvements made, and for the cost of erecting the said freight depot, all as specified in article 5th, over, above and beyond the rents reserved in this indenture or lease, to be paid by the party of the third part, its successors or assigns, if there should
465 be any such sum or excess, together with interest on such sums at the rate paid by the party of the third part, not exceeding twelve per cent. per annum. Provided always that the party of the third part, its successors and assigns, shall be limited to the sum of twenty-five thousand dollars ($25,000) for the first year, for permanent improvements other than the iron and track and the Rutland freight depot, unless the party of the first part shall consent to a larger expenditure.

And it is further stipulated, covenanted and agreed by and between the parties hereto, that at the same time and upon like conditions, the said party of the first part, its successors and assigns, shall and will purchase of the party of the third part, its successors or assigns, all fuel and supplies of every kind, and all shop stock and tools then used upon or along the line of said leased road in operating the same, and shall and will pay for the same as per inventory and valuation, to be made and agreed upon by the parties of the first and third parts hereto, their successors or assigns, and, in case they shall fail to agree, then the same shall be made by three disinterested persons, one of whom to be chosen by each of the two parties, their successors or assigns, and the other to be selected by the two so chosen.

And the said party of the third part, for itself, its successors and assigns, does further covenant and agree to and with the said parties of the first and second parts, their successors, heirs and assigns, by these presents, that the said party of the third part, its successors and assigns, shall and will, at the time and in the manner and order above limited and prescribed, pay or cause to be paid unto the said parties of the second and first parts, their heirs, successors or assigns, the rent above reserved, after making the deductions above provided to be made, according to the true intent and meaning of these presents.

And that on the last day of the term, or other sooner determination of this lease, the said party of the third part, its successors or

assigns, shall and will peaceably and quietly leave, surrender
466 and yield up unto the said parties of the first and second parts, their successors, heirs or assigns, all and singular the demised premises and property, according to their respective interests in the same as aforesaid.

Provided that if this lease terminates after July 1st, 1874, and said recited mortgage is not then fully paid, then and in that event, the said party of the third part, its successors and assigns, shall and will peaceably surrender and yield up the said demised premises unto the said parties of the second part, their heirs or assigns, free from any claim or demand of the party of the first part, their successors or assigns.

It is further agreed between the parties hereto, that the party of the third part shall keep all the buildings, bridges and other insurable property properly insured in good and responsible companies.

And it is further provided, that in the event of loss by fire or freshet exceeding in the aggregate, at any one time, $500, the parties of the first part will pay all cost, expense and damage caused thereby, in excess of said sum of $500 as aforesaid. And if said loss shall occur by fire, the amount of said insurance upon the property so destroyed shall, after payment of said $500 as aforesaid, be applied by the parties of the third part to the payment of said loss for the benefit of the parties of the first and second parts.

And it is further agreed between the parties hereto, that the party of the third part shall, within sixty days after the rents hereby reserved become payable, render a just and true account of the gross receipts of the road hereby leased, and also of all expenditures made under this lease, and that the parties of the first and second parts, or their duly authorized agents, shall have access to the books of the party of the third part at all times.

In witness whereof, the parties of the second part hereto
467 affix their names and seals, and the parties of the first and third parts have caused their official seals to be affixed, and
[L. S.] this instrument to be executed by their respective presidents in triplicate.

NEW YORK, BOSTON AND MONTREAL RAILWAY CO.,
By GEORGE H. BROWN, *President.*
[L. S.] T. W. PARK.
[L. S.] W. BUTLER DUNCAN.
[L. S.] CENTRAL VERMONT RAILROAD CO.,
By J. GREGORY SMITH, *President.*

County Tax Sale.

Whereas, the State and county taxes for the year 1877, imposed pursuant to the laws for the assessment and collection of taxes upon the following-described lands and property, situate in the city of Troy and towns in the county of Rensselaer, remain due and unpaid. Now, therefore, notice is hereby given, in pursuance of the

power vested in me by law, I shall, on the twenty-ninth (29th) day of November next, at the court-house, in the city of Troy, at ten a. m., commence selling at public auction the said lands and property hereinafter described and on which the taxes, interest and charges shall not have been paid for the lowest term of years of which any person shall offer to take the same in consideration of advancing the sum necessary to discharge the taxes, interest and charges for publishing the list of lands and property and conducting the sale, and shall continue to sell until the same shall be completed. The purchasers at said sale are to pay the amount of their respective bids to the county treasurer of said county within forty-eight hours after the sale, and will receive a certificate in writing, describing the land and property so purchased, the sum paid, the time to which the purchaser may be entitled to the possession thereof, and after the expiration of two years from day of sale
468 to receive conveyance of same as mentioned in the certificate, subject to the lien of any assessments for improvements made by the city of Troy or towns in the county, unless the owner or any person shall, within two years, redeem the same according to law.

"TOWN OF STEPHENTOWN.

"*Corporations.*

"Harlem Extension Railroad Company, eight miles of railroad in town of Stephentown..... ..... $854 37

"TOWN OF HOOSICK.

"*Corporations.*

"Harlem Extension Railroad Company, five and three-quarter- miles railroad in town of Hoosick..... 389 30

"TOWN OF PETERSBURGH.

"*Corporations.*

"Harlem Extension Railroad Company, one hundred acres, eight and a half miles superstructure..... 2,229 18

"TOWN OF BERLIN.

"*Corporations.*

"Harlem Extension Railroad Company, sixty-three and seven-eight-s acres iron tiles, building, etc., bal..... 54 12

"Treasurer's office, Troy, October 8, 1879.

"EDMUND FITZGERALD,
"*County Treasurer, Rensselaer County, N. Y.*"

469 Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

Russell C. Root and the Harlem Extension South Coal Transportation Company, answering the complaint in this action, by P. W. Ostrander, their attorney, say as follows:

I. They admit that the Lebanon Springs Railroad Company was a duly organized corporation prior to July 1, 1867, as alleged in said complaint, and that such corporation issued bonds to a large amount, but to what amount and to whom these defendants have not knowledge or information sufficient to form a belief, and they therefore deny the allegations in said complaint as to amount and persons and corporations to whom issued and localities where issued.

II. They admit the mortgage to the Union Trust Company, as stated in folios 5 and 6 of said complaint.

470 III. That defendants have not knowledge or information sufficient to form a belief whether or not plaintiff is holder and owner of eight thousand and seven hundred dollars of said bonds or any of said bonds, and has not knowledge or information sufficient to form a belief whether or not the town in which said plaintiff lives is holder and owner of one hundred thousand dollars of said bonds, and said defendants therefore deny the allegations in that behalf in said complaint contained.

IV. As to what, if any, proceedings were taken concerning a proposed consolidation of the Lebanon Springs Railroad Company and the Bennington and Rutland Railroad Company, and the alleged assumption by the Harlem Extension Railroad Company of the payment of said bonds, with interest, after January 1st, 1870, and as to the allegation in said complaint, that from the time of such alleged agreement, said railroad was run, operated and occupied a portion of the time by lessees, until on or after January 25th, 1873; these defendants have not knowledge or information sufficient to form a belief, and they therefore deny each and every the allegations in that behalf in said complaint contained.

V. These defendants admit the allegations in said complaint contained, as to the foreclosure of said mortgage (made to the Union Trust Company) by said Union Trust Company, and judgment and sale and conveyance of the entire property of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and they admit also the proceedings in the court of chancery in the State of Vermont, as stated in said complaint, except that they deny, upon information and belief, that the purchase price, under the sale in the proceedings in this State, to wit, one hundred thousand dollars,

was a "nominal" sum, and they deny, upon information and belief, that the property conveyed by the deed to James C. Hull,
471 mentioned in said complaint, was sold and conveyed to him for the use and benefit of the bondholders mentioned in said complaint; and except, also, that defendants say, upon information and belief, that the purchase price aforesaid was actually paid, and they further say that said property was conveyed to said James C. Hull, individually, by Charles S. Fairchild, referee in the foreclosure proceedings above mentioned by deed, dated January 25th, 1873. "To have and to hold the property and premises in said deed mentioned, and described and conveyed, or intended so to be, unto the said party of the second part" (said James C. Hull), "his heirs and assigns to his and their only proper use, benefit and behoof forever." And as to whether or not said Hull was a clerk or employé of William Butler Duncan or of Duncan, Sherman & Company, and as to whether or not said Duncan as one of said firm then owned a large amount or any amount of said bonds, and as to whether or not Charles S. Lincoln, named in said complaint, was or was not a clerk or employé of Trenor W. Park in said complaint named, or whether said Park was at the time mentioned in said complaint another holder of said bonds, defendants say that they have not knowledge or information sufficient to form a belief, and they therefore deny all the allegations in that behalf in said complaint contained; and except also that the defendants upon information and belief deny that said Lincoln bought the property referred to in the complaint (sold as aforesaid in chancery proceedings in the State of Vermont) for a "nominal" sum, or for the use and benefit of all of said stockholders; and except that these defendants upon information and belief deny that said Hull and Lincoln became the purchasers and received the deeds on such foreclosure sales in reality and in fact as agents of said bondholders, or in behalf of the said Lebanon Springs Railroad Company, but to the contrary thereof, that they severally purchased said property and took such title to and for themselves absolutely in fee and in their own right
472 individually and not as trustees or agents; and except also that the defendants deny upon information and belief that said Duncan and Park or either of them was then acting for and in behalf of all of said bondholders.

That these defendants admit the consolidation of the Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company, under the name of the New York, Boston and Montreal Railway Company, and they admit that said Hull and Lincoln made and executed a mortgage to William Butler Duncan and Trenor W. Park, for the amount stated in said complaint; but they have no knowledge or information sufficient to form a belief as to whether or not any "proceedings" had been instituted prior to said mortgage "sales which were believed to have been effectually executed," whereby said roads were consolidated, and they therefore deny the allegations in that behalf in said complaint contained, and they deny upon information and belief, that "in order to avoid any risk or loss to the bondholders," under said

two-million mortgage, and in contemplation of the last-mentioned consolidation, said Hull and Lincoln, nominal purchasers as aforesaid, made, executed and delivered to said William Butler Duncan and Trenor W. Park, who were the representatives and agents of the said bondholders, a mortgage upon all the property so as aforesaid purchased by them for the sum of $5,000,000, and contemporaneous therewith and in order to effectuate said consolidation, conveyed the whole of the property so purchased and mortgaged by them to the said New York, Boston and Montreal Railway Company, subject to the mortgage so given as aforesaid to said Duncan and Park for the bondholders as aforesaid; but they admit that on the 28th day of January, 1873, said James C. Hull and Charles G. Lincoln did execute a mortgage on the premises purchased by them as aforesaid to William Butler Duncan, of New York, and
473 Trenor W. Park, of Bennington, Vermont, to secure the payment of $5,000,000 on the 1st day of August, 1873, with interest thereon, and they admit that on the 30th day of January, 1873, said James C. Hull and Melissa A. Hull, his wife, as individuals and not as trustees or agents, conveyed, by deed of that date, to the New York, Boston and Montreal Railway Company, all the property and premises conveyed, or intended to be conveyed, to said Hull by said Fairchild, referee as aforesaid, "to have and to hold said premises, property and franchises unto the said party of the second part, its successors and assigns, to its and their only proper use, benefit and behoof forever," subject to the mortgage last above described, which deed contained covenants of further assurance and against grantor's acts; and defendants are informed and believe, and upon information and belief they state, that on or about the same date as the last-mentioned deed, the said Charles G. Lincoln, individually, executed to said New York, Boston and Montreal Railway Company a deed, in precisely the same terms as the one last recited, of the premises purchased by him as aforesaid in the chancery proceedings in the State of Vermont aforesaid, subject to said mortgage to said Duncan and Park.

VI. These defendants admit that the road referred to was for a time run by said Duncan and Park, but upon information and belief deny that it was so run by them as trustees for or in the interest of said bondholders, and these defendants admit the leasing of said road at the time and as shown in the complaint by Schedule "A," annexed thereto, to the Central Vermont Railway Company, but upon information and belief they deny that the foreclosure purchases and the lease were made for the sole benefit and advantage, or at all for the benefit and advantage, of the bondholders under the two-millions mortgage aforesaid, or in any way, or for any reason, for their benefit or advantage.

474 VII. That upon information and belief these defendants deny that said road was never in the actual possession of the New York, Boston and Montreal Railway Company; but it's the contrary thereof. They allege, upon information and belief, that said road was in the actual possession of said New York, Boston and Montreal Railway Company. In the same manner they deny

that in all the agreements of consolidation the indebtedness of said bonds to the owner thereof was assumed by the several companies respectively.

They admit that said Central Vermont Railway Company operated said road under the lease called Schedule "A," attached to the complaint, which lease was executed by the New York, Boston and Montreal Railway Company party of the first part, William Butler Duncan and Trenor W. Park, parties of the second part, and the Central Vermont Railway Company, party of the third part, and was dated November 3d, 1873, until some time in or about August, 1877, and then surrendered said road under said agreement; but on information and belief these defendants deny that said Duncan and Park, or either of them, were then acting for or in behalf of said bondholders.

VIII. These defendants admit that from the last-mentioned date until defendant Root took hold of it, which was on or about October 16th, 1877, said railroad was not operated, and upon information and belief defendants say that this period of inoperation was about six weeks.

IX. That as to the period or the quality of the insolvency of the New York, Boston and Montreal Railway Company these defendants have not knowledge or information sufficient to form a belief, and they therefore deny the allegation in that behalf in said complaint contained, but they admit that Daniel Butterfield was duly appointed by the supreme court of State receiver of its prop-
475 erty, and they allege on information and belief that such appointment was made on or about the year 1874, by said supreme court of this State, and that said Butterfield duly qualified as such receiver, and has never been displaced, removed or discharged from the said office, place and duty as such receiver but still occupies the same and is such receiver.

X. That these defendants have not knowledge or information sufficient to form a belief as to whether or not said Duncan and Park or M. H. Bloodgood and said B. Gardner, or one or more or any of said persons assuming to act for and in the name of the owners of the Lebanon Springs Railroad Company bonds took formal or any possession of the real estate, railroad property and effects mentioned in said complaint in the name and for the benefit of said bondholders, and these defendants therefore deny the allegations in that behalf in said complaint contained, and these defendants upon information and belief deny that they, said persons, or any of them did take such possession, acting for said bondholders, and said defendants on information and belief allege that no authority to take such possession was ever given to such persons or to any of them to so take possession of said property.

But these defendants admit that said road was lying unused when defendant Root began to run trains over it, and they admit that he so undertook to run and did run cars and trains over said described track, not only by the consent and desire of certain of the persons named, to wit, said Duncan, Park and Bloodgood, but also by the desire of a large number if not all the inhabitants on the line of

said track, Henry A. Tilden and the plaintiff Sackett included, in order that persons living on and near said track might be accommodated in the transportation of their persons and property, from which, to the great inconvenience and loss of all the vicinity, they had been to a large extent debarred by said road ceasing to be operated.

476 And defendant Root denies that he "announces and gives out that he expects and intends to operate and continue in the management of said railroad until a corporation may or shall be organized, which shall become vested with the title thereto and authorized to possess and operate the same."

XI. These defendants admit the allegations in the complaint contained as to the formation of the corporation defendants, The Harlem Extension Railroad South Coal Transportation Company, and their use and occupation of said track and property, but they deny, upon information and belief, that said track and property are the property of the bondholders aforesaid; and they deny all the allegations in said complaint contained as to the condition of said track and property, and the manner of its use and alleged abuse, and it being permitted to depreciate; the removal of side tracks to repair the single direct track; and all the allegations charging want of care or improper, wasteful or reckless use of said track, materials and property. Defendants admit that they have paid no one for the use of said track anything, and they say that they have not done so, because, first, they do not know of any one to whom to pay unless it be the defendant, Daniel Butterfield, as receiver as aforesaid, and he has never demanded any pay; and, second, because it has required all the earnings of the road, in the miserable condition in which it was left, to operate and run trains over said track, and to put and keep it in usable condition; and said returns have been so entirely used and applied.

XII. That as to the allegations in the complaint contained, beginning at folio 22, with regard to an alleged sale of a portion of said property by the treasurer of the county of Rensselaer for non-payment of taxes thereon defendants say:

477 First. That said taxes referred to in said complaint and appended notice were assessed upon said road and property prior to said defendants having any charge, care or use thereof. That all taxes and assessments which have accrued on said premises and property since said defendants, or either of them, have operated the road have been paid by them; and that defendant Root, since he began to operate the road, was informed by plaintiff, whom he had obtained to look into the matter of whether there were any prior unpaid taxes or assessments, that he, plaintiff, had examined and found that all the taxes and assessments were checked off; and that no sales for taxes or assessments had been made, and that nothing was required to be done till further notice, or words to that effect.

Second. That he is advised by counsel learned in the law that the time to redeem said property will not expire until on or about November 29th, 1881; and defendants deny, upon information and

belief, that plaintiff and other bondholders are the real owners of said property, and that by reason of any of the acts, condition or things charged in said complaint said plaintiff and others, bondholders, are continually sustaining loss. And defendants deny that in the present condition of things, state of said track, lack of connection with neighboring and through or trunk roads, and in the lack of large capital to relay and restock said road, and of the means to make it useful to other roads, that "it is possible by any fair, honest and prudent management said road might, could or would, pay something upon the said bonds, keep the said railroad improving and pay all expenses and taxes in so doing, thus providing something to pay on said bonds." And defendants say they are advised, and so they charge the fact to be, that these circumstances, however deplorable, furnish no reason in law why these bondholders or any other persons should have a right to seize said road, or have its custody or possession awarded or decreed to them, or the custody or possession thereof be
478 taken from any one in whom it may now be, or these defendants deprived of operating the same at the instance of this plaintiff, or at all in this action. And defendants further say that as matter of law they are advised and charge that whether or not any payments have been made on said bonds for more than ten years last past, is not any reason why plaintiff should have judgment or relief in this action, and as matter of law they are advised and charge and allege said railroad property is not a legitimate or possible source from which any payments on said bonds can be made; and defendants say that said property will not be rendered worthless unless relief can be obtained in this court, and upon information and belief, and as matter of law, defendants charge and claim that plaintiff and the other bondholders have rendered themselves remediless, if they are so, by not having combined and purchased in said road when it was sold under the mortgage given to the Union Trust Company to secure the very bonds now held by them.

XIII. That as to the said road being maintained in good condition and efficiently operated, being essential to the welfare and prosperity of the towns through which said railway is constructed, the desire of the bondholders to organize a corporation to operate said road and the want of power of towns to become parties to or assent to such an organization, defendants say they have not knowledge or information sufficient to form a belief, and they therefore deny the allegations in that behalf in said complaint contained.

Defendants admit that, in its present state and condition, it is impracticable to maintain said road efficiently by any unincorporated company on behalf of any one. These defendants admit that said bonds have little or no value, and they allege, as the reason therefor, that said bonds stand unsecured, the bondholders
479 having permitted the road to be sold under the mortgage intended to secure said bonds without attempting to purchase or without bidding it in, and thus saving their security. These defendants, being advised and believing that said bondholders have

no interest or property, right, title or claim of any kind in said road, its franchises, property, etc., deny that it is desirable that the same be sold, and as matter of law they claim and allege that it and they, said property, etc., cannot be sold in this action, and that if said property, road, franchises, etc., would be sold, that the proceeds could not be divided among said bondholders.

As to all and every allegation in said complaint contained, not in this answer specifically admitted or denied, these defendants, on information and belief, deny each and every thereof.

For a further and separate answer to said complaint, these defendants say, upon information and belief, that said complaint does not contain facts sufficient to constitute a cause of action, and they claim the same benefit from so much of this their answer — if they had demurred to said complaint upon such ground.

And these defendants pray that said complaint be dismissed, with costs.

P. W. OSTRANDER,
Attorney for Defendants Russell C. Root and The Harlem Extension Railroad South Coal Transportation Company.

Office and post-office address, No. 99 Nassau street (Bennett building), New York city.

480 CITY AND COUNTY OF NEW YORK, *ss:*

Russell C. Root, being duly sworn, says: That he is individually one of the defendants in above-entitled action, and president of The Harlem Extension Railroad South Coal Transportation Company, another of defendants in this action; that he had read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

R. C. ROOT.

Sworn to before me this 25th day of September, 1880.
WM. W. LADD, JR.,
Notary Public for Kings Co.

Certificate filed in New York city and county.

481 At a circuit court and special term of the supreme court held in and for the county of Rensselaer, at the court-house, in the city of Troy, on the 9th day of January, 1884.

Present: Theodoric R. Westbrook, justice.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

On consent of counsel in open court, it is ordered that the above-entitled cause be tried before Judge Westbrook, at his chambers in

the city of Kingston, without a jury, at a time to be fixed and designated by said justice.

SHEPARD TAPPEN, *Clerk.*

(A true copy.)
SHEPARD TAPPEN, *Clerk.*

482 Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

I hereby fix October 10, 1884, at 10 o'clock a. m., as the time, and the court-house in the city of Troy as the place for hearing this cause.

Dated September 23, 1884, at the Rensselaer circuit.

T. R. WESTBROOK,
Justice Supreme Court.

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT *et al.* } Notice of Trial.

Please take notice that the above-entitled action will be brought to trial at a circuit court appointed to be held in and for the county of Rensselaer, at the court-house in the city of Troy, New York, on the 10th day of October, 1884, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated September 23, 1884.

McCLELLAN & BROWN,
Attorneys for Plaintiff.

(Mailed copy to each —— 24, 1884.)

483 To P. W. Ostrander, Esq., attorney for R. C. Root and another; Messrs. Porter, Lowry, Loren and Stone, Esqs., attorneys for defendants Butterfield and others; F. L. Westbrook, Esq., attorney for appellant; to Jennings & Russell, Esqrs.; to Shipman, Barlow, Larocque & Choate, Esqrs.; to Hale & Bulkley, Esqrs.; to Edward Newcomb, Esq.; to Hamilton Harris, Esq.; to Campbell & Paige, Esqrs., 102 Broadway, New York city; to D. McCurdy, Esq., 2 Wall street.

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

COLUMBIA COUNTY, *ss:*

Hugh W. McClellan, being duly sworn, says that on the 24th day of September, 1884, he deposited in the post-office in the village

of Chatham, in said county, where the attorneys for the plaintiff reside and have their place of business, inclosed in a securely closed post-paid wrapper, a notice of which the foregoing is a copy, directed to "P. W. Ostrander, Esq., New York, N. Y.;" and also a similar notice in all respects, inclosed in a like post-paid wrapper, directed to "Porter, Lowry, Loren & Stone, Esqrs., New York, N. Y.;" and also a like notice, in a like wrapper in all respects, directed to "F. L. Westbrook, Esq., Kingston, Ulster Co., N. Y.;" and also a like notice, in a like wrapper in every respect, directed to "Jennings & Russell, Esqrs., New York, N. Y.;" also a like notice, inclosed in a like wrapper in all respects, directed to
484 "Shipman, Barlow, Larocque & Choate, Esqrs., New York, N. Y.;" also a like notice, in a like wrapper in all respects, directed to "Campbell & Paige, Esqrs., New York, N. Y.;" also a like notice, in a like wrapper in all respects, directed to "Hale & Bulkley, Esqrs., Albany, N. Y.;" also a like notice, inclosed in a like wrapper in all respects, directed to "Edward Newcomb, Esq., Albany, N. Y.;" also a like notice, inclosed in a like wrapper in all respects, directed to "Hamilton Harris, Esq., Albany, N. Y.;" and all of the said inclosures and post-paid wrappers were deposited in the said post-office before 5 p. m. of that day. That deponent is one of the firm of attorneys who appear in this action.

H. W. McCLELLAN.

Sworn to before me this 3d day of October, 1884.

ABRAM VOSBURGH,
Justice of the Peace.

Supreme Court, Rensselaer County.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

This action having been brought on for trial before the
485 Honorable Theodoric R. Westbrook, without a jury, by consent, at a circuit court held at the court-house, in the city of Troy, in and for the county of Rensselaer, in the State of New York, on the 10th day of October, 1884, and after hearing the proofs and allegations of the parties, I find the following facts:

First. That the Lebanon Springs Railroad Company was a corporation duly organized under and pursuant to the laws of the State of New York in the year 1852, and continued as such down to and including the 1st day of July, 1867, hereinafter mentioned.

Second. That thereafter the said company constructed its line of railroad from Chatham Four Corners, in the State of New York, to the State line between the States of New York and Vermont, in

Hoosick, in the county of Rensselaer; and also an extension thereof from the State line aforesaid to the town of Bennington, in the State of Vermont, which said extension was duly authorized by an act of the legislature of the State of New York, passed March 8, 1853, and various acts amendatory and supplemental thereto.

Third. By virtue of several acts of the legislature, the Lebanon Springs Railroad Company became and was vested with all the powers, franchises, rights and privileges of a railroad corporation of the State of New York, and became and was possessed and the owner of the following-described property: All and singular the track or roadway of the Lebanon Springs railroad, from Chatham Four Corners, in the county of Columbia, at the east line of the State of New York, to the town of Hoosick, in the county of Rensselaer, and all lands acquired and hereafter to be acquired for the purpose of forming said track or roadway, also the railroad of the said The Lebanon Springs Railroad Company already built,
486 and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereafter belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same, and of any and all of the above-mentioned powers and franchises, and also all the rolling stock, locomotives, stoves, ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, felt cars and cars of every description, all the machine shops and blacksmith shops, and all the materials used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York railroad, constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above powers and franchises of the said Vermont and New York Railroad Company belonging to or in anywise appertaining to or that may at any time belong or appertain or have belonged or appertained to the same or either of said railroads or companies, as well as in law or in equity, including also all property of every kind, name or nature of or purchased by or in the possession of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, and including also all property, powers and franchises of every name or nature.

Fourth. That on the 1st day of July, 1867, the said Lebanon Springs Railroad Company duly issued and sold its bonds to the amount of two million of dollars, which said bonds bore interest at the rate of seven per cent. per annum, payable on the first days of January and July in each year, and the principal in thirty years from the date thereof.

Fifth. That to secure the payment of said bonds the said
487 Lebanon Springs Railroad Company, on the 1st day of July, 1867, duly executed and delivered to the Union Trust Company of New York, its certain mortgage, bearing date on that day, whereby it mortgaged all its property, rights, powers and franchises, including all the premises, property and rights hereinbefore stated

to the said Union Trust Company of New York in trust to secure the payment of the said bonds; that the said mortgage contained a provision in substance the same as the condition of said bonds and with power and authority, in case of default in the payment of the principal or of the interest thereon as therein specified, to sell the said mortgaged property in due form of law, and with the further condition that in case default was made in the payment of the interest upon the said bonds, that then the whole principal sum thereby secured become due and payable, and which said mortgage continued to be, and was at the time of the foreclosure, as hereinafter mentioned, the first mortgage and lien upon all the said property, rights, powers and franchises.

Sixth. That by reason of and on account of default having been made in the payment of the interest due upon said bonds on and prior to the 1st day of January, 1870, and thereafter the whole principal sum secured by said mortgage became then due.

Seventh. That the plaintiff is the owner and holder of said bonds to the amount of $8,500, stated at the par value of the principal sum, and no part of the interest thereon or upon any of said bonds has been paid since January 1, 1870.

Eighth. That thereafter and in January, 1870, the Lebanon Springs Railroad Company duly consolidated its road, franchise and property with the road, franchises and property of the Bennington and Rutland Railroad Company, a corporation theretofore duly organized and existing under the laws of the State of Ver-
488 mont, and owning and operating a railroad from Bennington, in that State, where it connected with the railroad of the Lebanon Springs Railroad Company at Rutland, in the same State. And one company was thereby formed of said two companies, under the name of the Harlem Extension Railroad Company, which said last-named corporation became possessed of all and singular the rights, properties and franchises of said two railroad companies, and subject to all their and each of their respective liabilities. That by the terms of the consolidation agreement it was, among other things, provided that "the bonds of the Lebanon Springs Railroad Company, secured by a deed of trust or mortgage made by the said company to the Union Trust Company, bearing date July 1, 1867, are assumed by the consolidated company, with interest from and after the 1st day of January, 1870."

Ninth. That from and after the said first day of January no interest was paid upon said bonds either by the said Lebanon Springs Railroad Company or by the said Harlem Extension Railroad Company.

Tenth. That thereafter and on the 22d day of February, 1872, the Union Trust Company, of New York, began an action in the supreme court of the State of New York to foreclose the said mortgage executed by the said Lebanon Springs Railroad Company, by reason of the aforesaid default in the payment of interest thereon, in which action The Lebanon Springs Railroad Company, The Harlem Extension Railroad Company, William Butler Duncan and James B. Hodgskin were made defendants, in which said action

judgment of foreclosure and for a sale of all the road, property, powers and franchises of the Lebanon Springs Railroad Company, for the benefit of the holders of the bonds so issued by the Lebanon Springs Railroad Company, was duly rendered by said court in that action on the 10th day of December, 1872, and on the
489 same day entered in the clerk's office of Rensselaer county, and that under which said judgment all the powers, rights and franchises therein described were duly sold on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by the said court in that behalf, at Greenbush, in the county of Rensselaer.

Eleventh. That on said sale the said property was bid off by William Butler Duncan for the benefit of the bondholders of the Lebanon Springs Railroad Company for the sum of $100,000, that being the highest bid offered therefor.

Twelfth. That thereafter and on the same day, by the direction of said Duncan, and without the knowledge or consent of any of the bondholders, the said premises so bid off by him, as aforesaid, were conveyed by said referee to James C. Hull, the clerk of said Duncan, who was not present at such sale, by deed of conveyance, which deed was duly recorded in the clerks' offices in the counties of Rensselaer and Columbia, in the State of New York.

Thirteenth. That the terms and conditions of said sale were not complied with, and no part of said purchase price of $100,000 was ever paid by the said William Butler Duncan or James C. Hull, or any other person or persons, except that the plaintiff's taxable costs and the referee's fees in the foreclosure were paid by some person or persons.

Fourteenth. That neither plaintiff nor any of the bondholders of the Lebanon Springs Railroad Company, except, perhaps, William Butler Duncan and Trenor W. Park, had any knowledge or information of the said conveyance to James C. Hull, or of the non-compliance with the terms and conditions of sale, and the non-payment of the purchase price at said sale, or of any of the subsequent acts or transactions in respect to said property, until at or about the time of the commencement of this action.

490 Fifteenth. That neither the plaintiff nor any of the bondholders of said Lebanon Springs Railroad Company, unless it be the said Park and Duncan, have ever received any portion of the purchase price of said premises, or any sum of money whatever, either as the avails of said sale or as principal or interest of said bonds.

Sixteenth. That thereafter, and on the 30th day of January, 1873, the said John C. Hull and Eliza A., his wife, conveyed the said premises, rights and franchises conveyed to him by the said referee to the New York, Boston and Montreal Railway Company for the nominal consideration of five dollars, which deed was duly recorded in the counties of Rensselaer and Columbia, in the State of New York.

Seventeenth. That thereafter the said New York, Boston and Montreal Railway Company became and is utterly insolvent, and

on or about the — day of —— one Daniel Butterfield was, by the judgment of the supreme court of the State of New York, duly appointed receiver of all and singular the property, rights and franchises of the said The New York, Boston and Montreal Railway Company.

Eighteenth. That neither the said The New York, Boston and Montreal Railway Company, nor the said Daniel Butterfield, the receiver thereof, ever took possession, or used or occupied the said Lebanon Springs Railroad Company or its franchises, or claimed to exercise any control over the same, or possess any right thereto, and never paid any sum or sums whatsoever, as a consideration of the said pretended transfer; but on the contrary, abandoned the same, and although said receiver is made a party to this action he has made no claim to any right to or property therein.

Nineteenth. That from or about the time of the insolvency
491 of the New York, Boston and Montreal Railroad Company, and the appointment of a receiver thereof, and after its abandonment by the said company and the receiver thereof, down to the time of the commencement of this action, the said road, its property and franchises had been used and occupied by persons having no right or authority so to do and in violation of the rights of the bondholders, and the two last occupants of said road were the defendants Russell C. Root and The Harlem Extension Railroad South Coal Transportation Company. That neither of said last-named parties ever had, or claimed to have, any authority or right to use or occupy the said railroad or its property, or any part thereof, derived from any person or persons having a right to grant such authority.

Law.

First. That the said purchase by Duncan was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them.

Second. That the conveyance by the referee to James C. Hull, in accordance with the directions of Duncan, merely vested the title in Hull as trustee for the bondholders in whom the beneficial interest still remains.

Third. That the conveyance by Hull and wife to the New York, Boston and Montreal Railway Company was wholly ineffectual to pass any title to the New York, Boston and Montreal Railway Company, or to divest the bondholders of any right therein.

Fourth. That the title to and beneficial interests in the said railway company, its rights and franchises was continued to be,
492 and is, in the bondholders of the said The Lebanon Springs Railroad Company.

Fifth. That the said property, franchises and powers of the Lebanon Springs Railroad Company, as described in and enumerated in the said mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, and all of the right, title and interest of any and of all of the parties to this action, be sold at public auction according to the rules and practices of this court in actions for fore

closure of mortgages, and that all the parties to this action be barred and foreclosed of all right, title and interest in and to such property, powers and franchises, or any part thereof, and that a referee be appointed to make such sale under the rules and practice of this court. That in the decree or judgment to be entered in this action, such claim or claims shall be inserted therein as in the judgment of the court shall be necessary to protect the holders of receiver's certificates heretofore issued by the order of this court, or any person or persons who have valid claims upon the property and effects in the hands of the receiver, in consequence of the action of the receiver, or any order of this court.

Dated December 13th, 1884.

T. R. WESTBROOK,
Justice Supreme Court.

493 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION Railroad South Coal Transportation Company, The New York, Boston and Moutreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants. } January 12, 1885.

This action having been brought to trial by the court (trial by jury having been duly waived), and a decision having been rendered for the plaintiff and filed, whereby it appears that the purchase of the property, franchise and rights of the Lebanon Springs Railroad Company by William Butler Duncan, as stated and alleged in the complaint herein and as found by the said court, was for the benefit of the bondholders of the said railroad company and vested the right to a title thereto in the said bondholders; that the conveyance of said property and franchise by the referee, who sold the same, as alleged in said complaint and found by the court, to James C. Hull, in accordance with the directions of the said Duncan, vested the title thereto in said Hull, as trustee of the said bondholders, in whom the beneficial interest still remains; that the conveyance by said Hull and his wife to the New York, Boston, and Montreal Railway Company was wholly ineffectual to pass any title to said railway company, or to divest the said bondholders of any right therein; that the title to, and the beneficial inter-
494 est in, said Lebanon Springs Railroad Company was continued to be, and is, in the bondholders of said Lebanon Springs Railroad Company; that the said property, franchise and power of the Lebanon Springs Railroad Company, as described in and enumerated in the said mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company of New York, and all the right, title and interest of any and of all the parties in this action, should be sold at public auction according to the rules and practice of the court in

actions for foreclosure of mortgages, and that all the parties to this action be barred and foreclosed of all right, title and interest in and to such property, powers and franchises, or any part thereof.

And it appearing that during the pendency of this action the whole of said property, franchise, rights and powers has, by the order of this court duly made, been in the possession of a receiver duly appointed by such order, and that the same is still in the possession of such receiver; that an accounting of such receiver has been had by and before a referee appointed by the order of the court to hear, examine and report in respect to the accounts and receipts and disbursements, and the indebtedness of such receiver, and also to examine and report in regard to all claims for compensation for services by any party or parties that might or should be a charge or lien upon any of the said property in the hands of such receiver, and said referee having made in due form his report thereon as required, and such report having been duly confirmed by the order of this court, now, on motion of McClellan & Brown, attorneys for the plaintiffs, and on hearing Mr. Delos McCurdy, of counsel for the plaintiff, and Mr. Hamilton Harris, of counsel for the defendants, who have appeared in this action, and also as counsel for the bondholders of the Lebanon Springs Railroad Company, who have not been made parties to this action by name, and on hearing Mr. Henry D. Hyde and Mr. Matthew Hale, of
495 counsel for certain parties claiming to be holders of certain certificates issued by John W. Van Valkenburgh, as receiver, under the order made in this action, dated April 2, 1881, namely, for the Central National Bank of Boston, Massachusetts, to the amount of $250,000; and for the Massachusetts Mutual Life Insurance Company of Springfield, Massachusetts, to the amount of $50,000, and for Linus M. Price, as receiver of the Pacific National Bank of Boston, Massachusetts, to the amount of $19,000.

It is adjudged and decreed, that the purchase by William Butler Duncan of all and singular *to* the property, rights, powers and franchises of the Lebanon Springs Railroad Company, at the foreclosure sale thereof by Charles S. Fairchild, a referee, on the 25th day of January, 1873, was for the benefit of the plaintiff and others, bondholders of the said The Lebanon Springs Railroad Company, and vested the right to the title thereto in such bondholders.

And it is further adjudged and decreed, that the conveyance by the last-mentioned referee to James C. Hull of all such property, rights, franchises and powers, in accordance with the direction of such purchaser, Duncan, merely vested the title thereto in said Hull, as trustee of the aforesaid bondholders, in whom the beneficial interest still remains.

And it is further adjudged and decreed, that the conveyance by said James C. Hull and his wife of the said property, powers, rights and franchises to the New York, Boston and Montreal Railway Company was ineffectual to pass any title to said railway company, or divest the said Lebanon Springs Railroad Company bondholders of any right therein.

And it is further adjudged and decreed, that the title to and the

lawful interest in, the said Lebanon Springs Railroad Company, its rights and franchises and property was, and continued to be, and is, in the bondholders of the said The Lebanon Springs Railroad Company.

496 And it is further adjudged and decreed, that the certificates of indebtedness issued by John W. Van Valkenburgh, late receiver of the Lebanon Springs Railroad Company, under and by virtue of an order of the court made in this action, dated on the 2d day of April, 1881, amounting in the aggregate to $350,000, be and the same are hereby ratified and confirmed, and declared to be a first lien on said railroad and its property, as provided in and by the said order of April 2, 1881, and as stated in said certificates, for the amount of principal and interest unpaid thereon, subject, however, to the payment of costs and expenses hereinafter provided for and referred to in the order confirming the report of Judge Cadman, referee.

Also all unpaid claims and demands made or incurred by the receiver of said railroad company, as found due by the report of Hon. John Cadman, confirmed by an order of the court, dated October 25th, 1884, as such, or in consequence of his action as receiver, or of any order of this court, and the same are decreed to be a first lien on the said property and effects of said railroad in the hands of or under the control of the court, as directed by the order confirming the report of Hon. John Cadman, referee, herein.

And it is further adjudged and decreed, that the said property, franchises and rights of the Lebanon Springs Railroad Company, as described in and enumerated in the mortgage made by said company to the Union Trust Company of New York, as hereinafter particularly described and set forth, and all the right, title and interest of any and of all the parties to this action therein and thereto, including all the property and assets in the hands of the receiver in this action appertaining thereto, wherever the same may be, be sold at public auction in the county of Rensselaer by George McClellan, Esq., of Chatham, Columbia county, N. Y., referee, to whom it is referred to make such sale for the benefit of the first-mortgage bondholders of the said railroad company issued July 1st, 1867, for the

497 amount of $2,000,000, and that such sale be made subject to the payment of the undue principal and interest of the before-mentioned receiver's certificates; also subject to the unpaid claims and demands made or incurred by the receiver in this action, or in consequence of his action as such, or of any order of this court, not herein provided for and paid by the referee pursuant to the provisions of this judgment, and that the purchaser or purchasers of such railroad property and franchise shall take the said railroad property and franchise, subject to the unpaid principal and interest on the said receiver's certificates; also subject to the before-mentioned claims and demands which shall have remained unpaid as above stated; and the purchaser or purchasers shall assume, as part of the consideration of the said purchase, the payment thereof as above and herewith stated; that the said referee give public notice of the time and place of such sale according to the law and practice

of this court, in relation to sales in actions for foreclosure of mortgages; that any or either of the parties to this action may purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds or conveyances of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the plaintiff or his attorneys, the sum of $210, adjudged to the plaintiff's attorneys herein for the costs and disbursements, together with the sum of $2,000 for additional allowance in this action and for services rendered in and about the preservation and care of the trust property, by advising and as counsel to the receiver herein and his employés, with interest from the date hereof, and not embraced in the report of John Cadman, referee. And then that said referee further pay, according to the confirmed report of Hon. John Cadman, as aforesaid, the referee in this action, as follows:

First. The sum of $518.20 due Hon. John Cadman, referee, hereinbefore appointed, as referee's fees on report passing receiver's accounts.

498 Second. The sum of $100 to E. A. Brett, as an accountant on examination before said Cadman, referee.

Third. To McClellan and Brown the sum of $8,300, balance found due them by report of said Cadman, referee.

Fourth. To Edward Newcomb the sum of $12,386.38, balance found due him by said report of said Cadman for services rendered for said receiver.

Fifth. To Andrews and Edwards, $1,085, as found due them for counsel for receiver as found due by said Cadman, referee, in his report.

Sixth. To J. Rider Cady, $204, found due him for services rendered the receiver, by said Cadman, referee, in his report.

Seventh. To Hamilton Harris, $2,950, as found due him for services rendered herein for receiver, by the report of said referee, Cadman, and the further sum of $2,000 for counsel and advice to the receiver herein since the 15th day of December, 1883, which amount is hereby fixed by the court to the date hereof for services rendered subsequent to those passed upon by said referee, Cadman.

Eighth. To W. C. Van Alstyne, $2,273.83, found due him for services rendered for receiver, as found due by said Cadman, referee. All the foregoing amounts to be paid, with interest from the date hereof.

Ninth. To pay the amount of interest due on the receiver's certificate as found by said Cadman, referee, as existing at the date of his report, and such interest as may accrue and become due thereon up to the time of sale under this judgment, to the holders

499 thereof upon the production by them of their several certificates and coupons.

And all other claims found due by said referee's report and named in Schedules 1 and 2 in said report. Also all claims accrued or to accrue and unpaid in the running of said railroad by said receiver and his lawful commissions up to the day of the surrender thereof

to the purchaser or purchasers under the sale hereinbefore directed to be made.

And it is further ordered and directed, that any surplus produced upon the sale over and above the payments herein specially provided for, shall be brought into court by the said referee, to the end that such further order may be made to distribute the same among the persons entitled thereto as shall be just and according to the practice of this court.

And it is further adjudged, that the defendants, and all persons claiming under them, or any or either of them, be forever barred and foreclosed of all right, title and interest in the premises and property so sold or any part thereof.

The following is a description of the premises and property as contained in the mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, the interest of the parties to this action and of the bondholders of said Lebanon Springs Railroad Company, in which is directed to be sold as hereinbefore mentioned:

"All the right, title and interest of the said party of the first part of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part, from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all lands hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the
500 said party of the first part, now built and to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part, connected with said railway or relating thereto, including its right and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow-ploughs and scrapers, all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars, and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining or which may at any time belong or appertain to the same, as well in law as in equity."

And it is further ordered, that the referee shall sell as part of the property above described, and by a purchase at said sale the purchaser or purchasers shall acquire title to all property held by the receiver in this action and which he holds as such receiver,
501 and the purchaser or purchasers shall have possession of all of said property on the production of the referee's deed.

Enter.

T. R. WESTBROOK.

Filed January 27th, 1885, at 10.45 a. m.

SHEPARD TAPPEN, *Clerk.*

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I hereby certify that I have compared the annexed copy judgment-roll with the original thereof filed in this office on the 27th day of January, 1885, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and
[L. S.] affixed my official seal this 9th day of October, 1886.

SHEPARD TAPPEN, *Clerk.*

STATE OF NEW YORK,
Albany County, } ss:

I, William L. Learned, one of the justices of the supreme court of the State of New York, in the third judicial department of said State, do hereby certify that I have examined the annexed attestation of the clerk and the seal thereto to the annexed copy judgment-roll, and that the said attestation is in due form.

In witness whereof, I have affixed my hand this 11th day of October, 1886.

WM. L. LEARNED,
Presiding Justice Supreme Court, New York.

502 Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT, THE HARLEM EXTENSION RAILROAD SOUTH COAL Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as Receiver of the New York, Boston and Montreal Railway Company, Defendants.

To the supreme court of the State of New York:

In pursuance of, and by virtue of, a judgment of this court, made in the above-entitled action, on the twelfth day of January, one thousand eight hundred and eighty-five, by which it was, among other things, adjudged, that all and singular the property, rights, and franchises of the Lebanon Springs Railroad Company, as described and enumerated in the mortgage made by said company to

the Union Trust Company of New York, and all the right, title and interest of any and all of the parties to this action therein and thereto, including all the property and assets in the hands of the receiver in this action appertaining thereto, whatever the same may be, should be sold at public auction by the subscriber, a referee duly appointed therein for the purpose of making such sale; that said sale be made at public auction, in the county of Rensselaer and State of New York, for the benefit of the first-mortgage bondholders of the said railroad company, issued July 1st, 1867, for the amount of two millions of dol-
503 lars, and that such sale be made subject to the payment of the undue principal and interest of the therein before-mentioned receiver's certificates, also subject to the unpaid claims and demands made or incurred by the receiver in this action or in consequence of his action as such, or of any order of this court not herein provided for, and paid pursuant to the provisions of said judgment by the referee, and that the purchaser or purchasers of said railroad property and franchise, should take the said railroad property and franchise, subject to the unpaid principal and interest of the said receiver's certificates, also subject to the before-mentioned claims and demands, which should have remained unpaid as above stated, and that the purchaser or purchasers should assume, as part of the consideration for the said purchase, the payment thereof as therein stated, that said referee give public notice of the time and place of such sale, according to law, and the practice of this court in actions for foreclosure of mortgages, that any or either of the parties to this action might purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of conveyance of the premises and property sold; that out of the proceeds of such sale, after deducting his fees and expenses on such sale, he pay the costs of the plaintiff, and expenses and costs of attorneys, and bills and expenses of the receiver in this action, and certain interest due on the receiver's certificates, issued by order of the court, and other items particularly mentioned in said judgment; that any surplus produced upon the sale, over and above the said payments specially provided for, should be brought into court by the referee, to the end that a further order might be made to distribute the same among the persons entitled thereto; that the purchaser or purchasers shall have possession of all of said property on the production of the referee's deed. Therefore, I, the subscribed referee as aforesaid, do respectfully certify and report, that having been charged by the attorneys for the plaintiff with the
504 execution of the said judgment, I advertised said real estate, franchise and property to be sold by me at public auction at the Boston house, in the village and town of Greenbush, in Rensselaer county, N. Y., on the 31st day of March, 1885, at twelve o'clock noon of that day; that previous to said date I caused notice thereof to be publicly advertised for six weeks successively, as follows: By causing a printed notice thereof to be securely and conspicuously fastened up in three public places in the village and town where the said property was to be sold, and three like notices

posted in the same manner in each of the towns where the said property is situated in the counties of Rensselaer and Columbia in this State, and by causing a copy of said notice to be printed once in each week, immediately preceding such date, in a public newspaper printed in the county of Columbia, to wit, the Kinderhook Rough Notes, printed in Valatia, in said county; and in a public newspaper printed in Troy, in Rensselaer county, to wit, the Troy Press, which notices contained a description of the premises and property mentioned in the said judgment. And I do further report, that on said — day of March, and at the time and place last mentioned, the sale of said premises and property was adjourned by me until the 6th day of May, 1885, at the same hour and place as first advertised, and the same notice, by publication, in same papers and posting was had and made as before; and that at said place and at said house and on the day last named, the said sale was again adjourned until the 2d day of June, 1885, at same place and hour for which postponement like publication was made, and posting done as before, and that on said 2d day of June, 1885, at the hour and place named in said notice, I again adjourned said sale until the 12th day of June, 1885, at twelve o'clock noon, at the Boston house, in the village and town of Greenbush, in Rensselaer county,
N. Y. And I do further report, that on said last-men-
505 tioned day, the day to which the said sale was adjourned,
and at the time and place aforesaid, I attended and exposed the said real estate, franchises and property so advertised for sale at public auction, to the highest bidder, and the said premises, franchises and property were then and there fairly struck off to William Foster, Jr., trustee, for the sum of $155,000, he being the highest bidder therefor, and that being the highest sum bidden for the same. That according to the terms of said sale, the purchaser has paid $7,750 to the referee, and is to pay the balance of his bid within thirty days from said sale, on the confirmation of this report and delivery of the deed thereof and therefor.

Dated June 29th, 1885.

Filed June 30th, 1885.

GEO. McCLELLAN, *Referee.*

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I hereby certify that I have compared the annexed copy, report of sale, with the original thereof, filed in this office on the 30th day of June, 1885, and that the same is a correct transcript therefrom and of the whole of said original.

[L. S.] In testimony whereof I have hereunto set my hand and affixed my official seal this 15th day of September, 1886.

SHEPARD TAPPEN, *Clerk.*

STATE OF NEW YORK,
Albany County.

I, William L. Learned, one of the justices of the supreme court of the State of New York, in the third judicial department of said

State, do hereby certify that I have examined the annexed
506 attestation of the clerk and the seal thereto, to the annexed copy, referee's report of sale, and that the said attestation is in due form.

In witness whereof. I have affixed my hand this 11th day of October, 1886.

W. L. LEARNED,
Presiding Justice Supreme Court, New York.

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

STATE OF NEW YORK,
County of Ulster.

Wallace H. Smith, being duly sworn, says he is over the age of twenty-one years; that at the city of Kingston, on the 7th day of April, 1881, he served a copy of the annexed order on Frederick L. Westbrook personally, and leaving the same with him.

W. H. SMITH.

Sworn to before me this 8th day of April, 1881.
JOHN HUSSEY, *Recorder.*

507 At a special term of the supreme court of the State of New York, held at the supreme court chambers, in the city hall, in the city of Kingston and county of Ulster, on the 2d day of April, 1881.

Present: Hon. T. R. Westbrook, justice.

RENSSELAER COUNTY, *ss:*

Supreme Court.

MARVIN SACKETT, Plaintiff,
against
RUSSELL C. ROOT and Others, Defendants.

On reading and filing the petition of John W. Van Valkenburgh, Esq., receiver of the Lebanon Springs Railroad Company, verified the 23d day of February, 1881, the order made thereon, under date of March 5th, 1881, appointing James H. Jones, Esq., an expert, to examine the condition of said Lebanon Springs railroad, and to report thereon to the court. The report of said James H. Jones, Esq., to the court, dated March 19th, 1881. The orders appointing the receiver herein, dated October 1st, 1880, and December 4th, 1880, in the case of the People of the State of New York against said railroad. The supplemental petition of said receiver and Schedule "A" thereto annexed, verified March 22d, 1881. The notice of motion, returnable this day and term, with due admission of service thereon.

508 And it appearing from said papers that the said railroad is out of repair, and said James H. Jones, in his report, recommends this court to instruct the receiver thereof to put the same in repair as to tracks, ties, bridges, telegraph poles, culverts and roadbed, and after hearing Mr. Edward Newcomb, counsel for said receiver, and Robert E. Andrews, associate counsel for said motion, and no one appearing in opposition thereto, and after mature deliberation thereon,

It is ordered, that John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, be and is hereby authorized and directed to issue, under his hand, receiver's certificates of indebtedness, dated April 2d, 1881, with interest at six per cent., of $500 each, payable in five years, with interest coupons thereto attached, payable on the first day of January and July in each year, in the aggregate amount of $350,000, said certificates to be signed by said John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, consecutively numbered from 1 to 700 inclusive, and a certificate on each thereof, duly signed by one of the officers of the Farmers' Loan and Trust Company, of New York City. The said certificates are of the series included in the numbers and amount aforesaid. That said certificates and the interest coupons thereto attached be made payable at said Farmers' Loan and Trust Company, in said city of New York.

It is further ordered, that said receiver negotiate said certificates to the amount aforesaid, and with the money arising therefrom, said receiver is directed, first, to pay and discharge the $25,000 of certificates heretofore authorized by an order of this court, dated the 25th day of October, 1880, and duly cancel said $25,000 of certificates, and the interest thereon, and upon said cancellation of said certificates, that said order of the 25th day of October, 1880, be and the same is hereby vacated, and said receiver's rights to the issuing of ad-
509 ditional or any part of said $25,000 of certificates as, under and by said order directed, is canceled, and he is hereby forbidden to issue any more or any part thereof.

Second. The said receiver is hereby empowered and directed, from the moneys arising from said certificates herein authorized to be issued, to purchase all necessary materials for the repairs of said road, and pay and discharge all necessary expenses incident to the repairs thereof, with all other expenses attending the running and successful managing and operating of said railroad, as by the order appointing him receiver herein provides, together with such indebtedness as may be found due claimants by the referee herein named, and for said purpose.

It is further ordered, that Hon. Smith Strait, county judge of Rensselaer county, be and he hereby is appointed referee to hear and determine all existing claims against said Lebanon Springs Railroad Company, now filed, or hereafter to be filed, with said receiver.

It is further ordered, directed and decreed, that said receiver's certificates of indebtedness, to the amount herein directed to be issued, be and the same are hereby declared to be a debt of the

receiver, incurred for the benefit and protection of the said Lebanon Springs railroad and its owners and bondholders thereof, which certificates to the amount herein specified, viz., $350,000, are declared and decreed to be a first lien on said railroad bed, track, ties, bridges, trestles, culverts, engines, cars, depots, and all and every kind of property, either owned by said railroad company, or in the possession of the receiver thereof; and are to be recognized as such in any reorganization of the company or in its consolidation with any other company. And in case of any sale of the said railroad, the property in the hands of the receiver and franchises under any decree of the supreme court, these certificates are to be first paid from the first moneys realized thereupon by the receiver,
510 unless sooner paid and canceled by him from the earnings of the said railroad.

But in case in said railroad, the property in hands of the receiver and franchises on any sale thereof does not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates hereinbefore authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver and franchises assumes, as a first lien thereon, so much thereof as at that time remains outstanding and unpaid, with the interest thereon.

Enter in Rensselaer county.

(Signed) T. R. WESTBROOK,
Justice Supreme Court.

Filed April 4, 1881.

STATE OF NEW YORK, }
City of Troy, County of Rensselaer, Clerk's Office. }

I hereby certify that I have compared the annexed copy order with the original thereof filed in this office on the fourth day of April, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed my official seal this 4th day of April, 1881.

JAMES KEENAN, *Clerk.*

STATE OF NEW YORK, }
City of Troy, County of Rensselaer, Clerk's Office. }

I hereby certify that I have compared the annexed copy order, directing receiver to issue certificates, etc., with the original thereof filed in this office on the 9th day of June, 1882, and that the
511 same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and
[L. S.] affixed my official seal this 16th day of August, 1883.

JAMES KEENAN, *Clerk.*

STATE OF NEW YORK, }
County of Albany. }

I, William L. Learned, one of the justices of the supreme court of the State of New York, in the third judicial department of said

State, do hereby certify that I have examined the annexed attestation of the clerk, and the seal thereto, to the annexed copy order, directing receiver to issue certificates, etc., and that the said attestation is in due form.

In witness whereof, I have affixed my hand this 11th day of October, 1886.

WILLIAM L. LEARNED,
Presiding Justice Supreme Court, New York.

STATE OF NEW YORK.

Whole issue, $350,000.

No. 435. $500.

Lebanon Springs Railroad Company.

Receiver's Certificates of Indebtedness.

This is to certify that there is due to —— —— or bearer, from the receiver of the Lebanon Springs Railroad Company, as such receiver, but not personally, the sum of $500, with interest at the rate of six per cent. per annum. The principal sum hereof, payable on the 2d day of April, 1886, on the presentation and surrender of this certificate when due, at the same place the interest is payable. The interest herein to be paid on the presentation and surrender, at the office of the Farmers' Loan and Trust Company, in the city of New York, of the annexed coupons, as they severally became due.

512

This certificate is one of a series of the same denomination, not to exceed in the aggregate the amount of $350,000, issued under authority of an order of the supreme court of the State of New York, made at a special term thereof, held at the city hall, in the city of Kingston, county of Ulster, on the 2d day of April, A. D. 1881, and duly filed and entered with the clerk of Rensselaer county on the 4th day of April, A. D. 1881, a certified copy whereof is filed with the trust company hereinbefore named, which certificates, to the amount of $350,000, are declared to be a debt of the receiver, for the benefit and protection of the said Lebanon Springs railroad property, its owners and bondholders thereof, and to be a first lien on said railroad bed, tracks, ties, bridges, trestles, culverts, engines, cars, depots, and all and every kind of property, either owned by said railroad company, or in possession of the receiver thereof, and are to be recognized as such in any reorganization of the company, or its consolidation with any other company, and in case of any sale of the said railroad and the property in the hands of the receiver, and franchises, under any decree of the supreme court, these certificates are to be first paid, from the first moneys realized thereupon by the receiver, unless sooner paid and cancelled by him from the earnings of the said railroad.

But in case said railroad, the property in hands of the receiver and franchises on any sale thereof do not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates, authorized to be issued by said order, then the pur-

chaser of said railroad and franchises and the property in the hands of the receiver is to assume said certificates as a first lien
513 thereon, or so much thereof as at that time remain outstanding, with interest.

In witness whereof I have signed this certificate as such receiver, but not personally, this 2d day of April, A. D. 1881, at Albany, N. Y.

J. W. VAN VALKENBURGH,
As Receiver of the Lebanon Springs Railroad Company.

Coupons attached.

Coupon.

Coupon. No. 2.

The Lebanon Springs Railroad ($15) Co.

Receiver's Certificate of Indebtedness.

The holder hereof is entitled to fifteen dollars (figures 1 stamped on) on presentation and surrender of this coupon at the office of the Farmers' Loan and Trust Company, in the city of New York, being the interest due January 1, 1882.

On certificate No. 1.

J. W. VAN VALKENBURGH, *Receiver.*

(Indorsement:) No. 435. Lebanon Springs Railroad Company, receiver's certificate of indebtedness, $500. Interest six per cent., payable January and July, at Farmers' Loan and Trust Company, New York city. Trustee's certificate. This is to certify that the within certificate is one of a series of 700 in number, for $500 each, issued by the receiver of the Lebanon Springs Railroad Company, under authority given him by order of the supreme court of the State of New York, as in the within certificate set forth. Farmers' Loan and Trust Company, trustee, by R. G. Rolston, president.

514 Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

By virtue of a judgment of sale, made in the above-entitled action on the 12th day of January, 1885, the subscriber, a referee for that purpose duly appointed, will sell at the Boston house, in the village and town of Greenbush, in Rensselaer county, on the 31st day of March, 1885, at twelve o'clock noon of that day, the real estate, franchises and property directed by said judgment to be sold and described therein as follows: "The following is a description of the premises and property as contained in the mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, the interest of the parties to this action, and of the bondholders of said Lebanon Springs Railroad Company, in which is directed to be

sold: All the right, title and interest of the said party of the first part (said railroad company) of, in and to all and singular the several pieces or parcels of land forming the track of roadway of the party of the first part, from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosic, in the county of Rensselaer, and all lands hereafter to be required for the purpose of forming said track or roadway; also, the railroad of the said party of the first part, now built and to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of
515 the first part, connected with said railway or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow-ploughs and scrapers; all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description, all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first —; all of which chattels are declared to be fixtures and appurtenances to said railroad and are to be and be sold therewith and not separate therefrom and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining or which may at any time belong or appertain to the same, as well in law as in equity," and also all property held by the receiver in this action and which he holds as such receiver.

Dated January 27, 1885.

GEORGE McCLELLAN, *Referee.*

516 Supreme Court.

MARVIN SACKETT *against* RUSSELL C. ROOT *et al.* } "A." Terms of Sale.

The premises and property described in the annexed advertisement of sale will be sold under the direction of George McClellan, the referee in this action, including all the property and assets in the hands of the receiver in this action, subject to the payment of the undue principal and interest upon the $350,000 of certificates made by the receiver, according to the order of the court in this action, also subject to the unpaid claims and demands made or incurred

r the receiver in this action or in consequence of his action as ich, or of any order of the court not provided for and paid by the feree pursuant to the provisions of the judgment in this action, id which certificates, and interest, and claims and demands unpaid before mentioned the purchaser or purchasers shall assume as art of the consideration of the purchase thereof upon the follow-ig terms:

1. Five per cent. of the purchase price and money to be paid for ie said property and premises will be required to be paid to the id referee at the time and place of sale and for which referee's re-eipt will be given.

2. The residue of said purchase-money will be required to be aid to the said referee, at the law office of McClellan & Brown, in hatham, N. Y., within thirty days, when the said referee's deed will be ready for delivery.

17 3. The referee is not required to send any notice to the purchaser, and if he neglects to call at the time and place bove specified to receive the deed, he will be charged with interest hereafter on the whole amount of his purchase unless the referee hall deem it proper to extend the time for the completion of said urchase.

4. All taxes, assessments and water rates, which, at the time of ale are liens or incumbrances upon said premises, which have not pparently become absolute, will be allowed by the referee out of he purchase-money, provided the purchaser shall, previously to the elivery of the deed, produce to the referee proof of such liens, and uplicate receipts for the payment thereof.

5. The purchaser of said premises and property, or any portion hereof, will, at the time and place of sale, sign a memorandum of is purchase.

6. The bidding will be kept open after the property is struck down nd in case any purchaser shall fail to comply with any of the bove conditions of sale, the premises or property so struck down to im will be again put up for sale under the direction of said referee, nder the same terms of sale, without application to the court, nless the plaintiff's attorneys shall elect to make such application, nd such purchaser will be held liable for any deficiency there may e between the sum for which said premises or property shall be truck down upon the sale and that for which they may be pur-hased on the resale, and also any costs or expenses accruing on uch resale.

Dated June 12, 1885.

GEORGE W. McCLELLAN, *Referee.*
WM. FOSTER, JR., *Trustee,*
Per DELOS McCURDY.

518 MEMORANDUM OF SALE.—I, William Foster, Jr., trustee, have this 12th day of June, 1885, purchased the premises and property described above, and in the annexed printed advertise-ment of sale for the sum of $155,000, and hereby promise and agree

to comply with the terms and conditions of sale thereof, as above mentioned and set forth.

Dated June 12th, 1885.

WM. FOSTER, JR., *Trustee*,
Per DELOS McCURDY.

Deed.—George McClellan, referee, to William Foster, Jr., and Roland N. Hazard.

Deed.—William Foster, Jr., and Roland N. Hazard to the New York, Rutland and Montreal Railway Company.

Stub of Certificate from Book of Certificates.

No. 1.
$500.
Date of sale:
..... 188.
To whom sold:
.....
.....
.....
.....
The Lebanon Springs Railroad Company.
Receiver's certificate of indebtedness.
Dated April 2d, 1881.
Payable April 2d, 1886.
One per cent.
Interest payable at the Farmers' Loan and Trust Company, New York.

519 At a special term of the supreme court, held at the supreme court chambers, it the city of Kingston, on the 12th day of September, 1885.

Present: Hon. T. R. Westbrook, justice.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

WILLIAM V. REYNOLDS, Receiver, &c.,
against
THE CENTRAL NATIONAL BANK OF BOSTON.

Upon reading the affidavit of Delos McCurdy, and the order to show cause granted thereon, on file in the first of the above-entitled actions, and on reading and filing the order to show cause granted by Justice Westbrook on the 8th day of September, 1885, together with the affidavits of Moses W. Richardson, Alpheus T. Bulkley, George Addington and Matthew Hale, annexed thereto, and an

ffidavit of M. Hale, verified September 12th, 1885, and on reading he judgment entered herein in the first above entitled action, dated anuary 12th, 1885, and the order of April 2d, 1881, authorizing he issuing of receiver's certificates, and the report of John Cadman, eferee, and the order confirming the same in the first above entitled action, and on reading and filing the complaint and answer
520 in the secon l above entitled action, and also the affidavits of Hugh W. McClellan and George McClellan; after hearing Messrs. McCurdy, McClellan and Andrews, of counsel for the plaintiffs, and Messrs. Hyde and Hale, of counsel for the Central National Bank of Boston, and other certificate-holders, and Mr. Newcomb in his own behalf, Mr. McClellan also appearing for George McClellan, referee, it is ordered:

1. That the plaintiff's motion for an order restraining the referee from payment of the interest on receiver's certificates be and the same is hereby denied.

2. That the said referee be, and he hereby is, directed forthwith to obey the directions of the judgment by paying to the attorneys for the certificate-holders the interest directed to be paid by said judgment, upon the presentation of said certificates and the surrender of the past-due coupons attached, including the coupons which became due July 1st, 1885.

3. That the said referee do, after making the payments above mentioned, forthwith withdraw the balance of the funds remaining in his hands from the American Loan and Trust Company (except so much thereof as may be necessary to meet checks heretofore issued by him), and deposit the same in the National Commercial Bank of Albany.

4. That William V. Reynolds, the plaintiff in the second above entitled action, the receiver appointed by the court in the first of said actions, be and he is hereby directed forthwith to discontinue the action heretofore brought by him, as said receiver, against the Central National Bank of Boston, being the second above entitled action, and to pay to the defendant in said action, or its attorneys, its costs therein out of the funds in his hands as such receiver.

521 5. That the said William V. Reynolds do present his accounts, as such receiver, to Warren S. Kelly, Esq., who is hereby appointed referee to examine and pass upon the accounts of said receiver, upon notice to the parties interested therein, and state the same to this court.

6. That the said Central National Bank of Boston do recover twenty dollars costs of the two motions herein, to be paid by George McClellan, Esq., the referee first above named, out of the funds in his hands.

Enter in Rensselaer county.

T. R. WESTBROOK.

Filed September 18, 1885.

STATE OF NEW YORK,
City of Troy, County of Rensselaer, Clerk's Office.

I hereby certify that I have compared the annexed copy order with the original thereof filed in this office on the 18th day of September, 1885, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 27th day of October, 1886.

[L. S.] SHEPARD TAPPEN, *Clerk.*

522 STATE OF NEW YORK,
Albany County.

I, William L. Learned, one of the justices of the supreme court of the State of New York, in the third judicial department of said State, do hereby certify that I have examined the annexed attestation of the clerk and the seal thereto to the annexed copy referee's report of sale, and that the said attestation is in due form.

In witness whereof, I have affixed my hand this — day of October, 1886.

W. L. LEARNED,
Presiding Justice Supreme Court, Third Department.

Plaintiffs' counsel then offered in evidence from printed case the testimony of Trenor W. Park taken before a committee of the legislature and F. G. Swinnington taken on the former trial, from said printed case, as follows, each and every part of which was objected to by Messrs. Larocque and Jennings, respectively, as immaterial, incompetent and irrelevant, but said objections were overruled and said testimony admitted.

TRENOR W. PARK, being duly sworn, testified as follows:

By Mr. STETSON:

Q. Where do you reside?

A. I reside in Vermont, but spend most of my time in New York.

Q. What is your business?

A. My profession is an attorney, but for some years I have turned my attention to other business, railroad and bank.

Q. Are you about going to the Pacific coast?

A. I am to leave on Wednesday evening.

523 Q. Whatever the information we desire from you you desire your examination shall be finally concluded before that time?

A. Yes, sir.

Q. Did you ever know anything about a railway called the Lebanon Springs railroad?

A. Yes, sir; I think I know pretty much all about it.

Q. Will you state where that railroad runs?

A. It is a railroad that runs from Bennington; a road about

fifty-nine miles in length, connecting at Bennington, Vermont, with a road that I own running from Bennington to Rutland, of about the same length, and connecting in the State of New York at Chatham with the Harlem road, and with the Albany and Boston road, and the road also running from Hudson up to Chatham; the road was commenced in the year 1867, and completed the very last part of 1868; I believe the first train was run over it in January, 1869.

Q. Before you pass on please mention the two extreme termini of the road?

A. At Bennington, Vermont, the road running about five miles in Vermont, and there are acts of the legislature of the two States authorizing a consolidation, and then at Chatham Four Corners the other terminus

Q. The extreme termini were Bennington, Vermont, and Chatham, in Columbia county, in the State of New York?

A. Yes, sir.

Q. Being at extreme distance of fifty-nine miles?

A. Yes, sir.

Q. Any branches?

A. No branches.

Q. This road was sometimes known as the Harlem extension; it substantially effected a junction between the Harlem road running in this State to Chatham Four Corners, and the Western Vermont railway, which runs from Rutland down to Bennington; this road substantially established a communication between the Harlem railroad having its northern terminus at Chatham Four Corners and the Western Vermont, having its southern terminus at Bennington?

A. Yes, sir.

Q. Thereby giving a through road from New York to Montreal?

A. Yes, sir.

524 Q. What was the capital stock of the company?

A. The capital stock was two millions and the bonded debt two millions; the road has been, years before, under Schuyler—before his failure a great many years ago—commenced, and a number of hundreds of thousand dollars expended, and that was given up to this road and we got the benefit of it with very little cost; the road was built with the bonds and the stock was given to an equal amount to each party that subscribed to the bonds, and I don't know but they subscribed to the bonds and took an equal amount of stock; there was two millions of stock and two millions of bonds, and two millions built the road.

Q. What you mean I suppose is, you don't know but the subscribers to the stock took an equal amount of bonds?

A. I have forgotten whether the subscription was for the bonds and gave them an equal amount of stock, or the subscription was for the stock and you gave them an equal amount of bonds.

Q. Two millions built the road?

A. Yes, sir; the road had been a great many years before that chartered, commenced and then abandoned, in consequence of the failure of Schuyler before I had anything to do with it; I came

back from California after a residence there a good many years and purchased the interest in the road from Bennington to Rutland, of about sixty miles.

Q. The Western Vermont road?

A. The Western Vermont road it was called then, which had been foreclosed and the bonds purchased to acquire the title; then it became interested to me as the owner of the road to get a connection through with the Harlem, to get a through line from Montreal to New York, and used the road that I owned as a part of that line; Commodore Vanderbilt, as the controller and large owner of the Harlem road, professed to, and, I have no doubt, did want the road built for the purpose of furnishing the same business to the
525 Harlem road, and we started a subscription, after some legislation in both States, extra Federal legislation as to consolidation, etc., and I took one-quarter of it myself, $500,000, and afterwards, before the completion, I took over $200,000 more; so I took over $700,000 of the whole, taking the bonds and stock; and the towns in Vermont, under an act, also took $332,000, although they were not on the road, but it was important to them that they got this outlet; the towns in New York that the roads run through took, according to my recollection, $246,000; perhaps I am not exactly right about that, but somewhere in that vicinity, making my own and the towns some $1,300,000 or 1,400,000 of the whole sum.

Q. I make it $1,278,000?

A. Perhaps that is right.

Q. This $700,000 to you, $332,000 to the towns in Vermont, and $246,000 to the towns in New York.

A. I have forgotten the exact amount; it was over $200,000 in New York.

Q. In round numbers, it was about $1,300,000, represented by the towns and yourself?

A. Yes, Commodore Vanderbilt took, for himself and in the name of his son, $250,000; Mr. Augustus Schell and Mr. Clark, a son-in-law, took $50,000 each; and the balance of it, which would be some $300,000, more or less, was taken by different parties in New York, and a little of it in Vermont; I suppose you will want a short story; we advertized to let the contract, and our money wouldn't pay for it by any contract, by $200,000 or $300,000, to contractors; and I took the contract, in my anxiety to build the road, for the money that we had; and I built it with cash and lost about half a mill-on in building it; and the road was completed and operated in January, 1869, with these bonds outheld by these parties; in 1869, to go back, I sold a portion of my upper road, the Bennington and Rutland road, to Mr. Samuel J. Tilden and Henry Tilden, and Moses, his brother; Duncan, Sherman & Co.,
526 A. A. Selover, General Baxter, Oliver Charleck; and Mr. Duncan acted as our trustee; I resigned the presidency, and Mr. Charleck was made president; my health was poor then, and I had to give it up on account of my health; Commodore Vanderbilt wanted to consolidate the Lebanon Springs road with the North-

ern road, my road ; in fact, I sold one-half or four-fifths of one-half of my road ; when we commenced to build the Lebanon Springs railroad I had given Commodore Vanderbilt a call on one-half of my road at $500,000 for two years ; and after I had sold four-fifths I sold four-fifths of the other half, retaining one-fifth of that and contracting to sell four-fifths of the other half if Commodore Vanderbilt didn't make the call ; if he did, he had the right to it ; Commodore Vanderbilt wanted to make that consolidation between the two roads ; he offered, if we would consolidate, that he would make this call ; and, in consequence of that promise, the consolidation was made, and the stock was then made $4,000,000 ; the upper road being about the same length, but of more value, because a larger local business ; it was consolidated to make $4,000,000 of bonds and $4,000,000 of stock, the two roads being 120 miles in length, into one road, and that was called the Harlem extension ; the first road that was built was the Lebanon Springs road, and that was in the year, the last part of the year according to my recollection, of 1869, or the first of the year of 1870 and the charge of the entire road was passed over to the Harlem road ; Mr. Horace Clarke was made president of it—I won't be certain whether it was him or Augustus Schell, but they run it, and Mr. Niven, who was the treasurer and manager of the Harlem road, was made treasurer and really was the manager of the road ; they made a new mortgage of four millions to cover the two millions of mortgage on the Harlem road and two millions of mortgage that was to be given to the owners of the road north, the Bennington and Rutland ; we had a mortgage on it of $500,000 which was held entirely by Commodore Vanderbilt ; he took that mortgage at
527 the time I gave him that call and gave me the money for it to help me build the lower road, and that made the consolidation and they took charge of it ; in about a year after that, owing to bad management, or the road not meeting the expectations or something, at any rate the road was turned back by the Harlem road and Mr. Duncan was made president of the entire road ; Mr. Duncan, who was a large owner—that was before the failure of Duncan, Sherman & Co.—took the presidency of it ; in 1872 there was a plan originated—to go back a little after we had made the consolidation according to Commodore Vanderbilt's request he refused to take this call of the one-half, and a litigation was commenced between him and the road ; he commenced to foreclose his $500,000 mortgage which was due.

Q. That being a mortgage only on the upper road?

A. On the upper road and we filed a cross-bill that he was to surrender that mortgage in payment of his call of $500,000, and we required him to take the call ; that litigation was commenced and was in court until after his death, and I settled it very quickly with his son ; that leaves the position of it at that time.

Q. Now let us see what the position then was?

A. Then in 1872 the position was this, that the two roads were consolidated, the Lebanon Springs road's bonds had not been cancelled and delivered up.

Q. The first issue?

A. The first issue; they had a right to cancel them and take a portion of the four millions, but the four millions had never been issued; two millions more issued to pay the northern part, our part, and the other two millions to pay the lower part; they had never called for them, and none of them were changed; they were a distinct mortgage on the Lebanon Springs road; that runs it down to 1872, and from 1869, early in 1869 to 1872, for one year at least, the Harlem road run it, and for another year Mr. Duncan, and then a scheme was gotten up for making the New York, Boston and Montreal road, which was a road from New York to
528 Montreal by the use of the New York and Boston road, as it was called, running up from here to Lake M—— and beyond.

Q. Now the New York City and Northern?

A. Yes, sir; and then putting in a connection to connect with Brown's road—what is the name of it?

Q. Poughkeepsie and Eastern?

A. No—Dutchess and Columbia; that was to be put in and then another connection with the Dutchess and Columbia to Chatham Four Corners to take in these roads; that was when our roads were in litigation with Vanderbilt, and we were trying to get another way out, and when that negotiation was commenced I was in Europe, it was commenced by the other parties; when I came back they had completed it in an agreement, and I agreed to it, being the largest owner; and it was agreed—and this comes to the point that I understand you want to inquire after—it was agreed that our two roads should be put into the New York, Boston and Montreal road at about five millions, and the $5,000,000 was to be paid, according to my recollection, $2,700,000 in cash and the balance, to make up about the five millions, in second-mortgage bonds of the New York, Boston and Montreal; Mr. Duncan or myself were neither of us directors in the New York, Boston and Montreal; I was first a director a short time before that negotiation was made and resigned, and Samuel J. Tilden was appointed in my place; then we went around to the stockholders to get them to agree to surrender up the stock and bonds of the Lebanon road, or Harlem extension, and take this agreement of stock in the New York, Boston and Montreal, a percentage in cash, and the other percentage in second-mortgage bonds; we soon run against the difficulty, they were too scattered, a great many bondholders we couldn't find; in the meantime this mortgage of $2,000,000 on the Lebanon Springs road was made to the Union Trust Company.

Q. You are referring to the second mortgage or the first?

529 A. No, the original mortgage; and Commodore Vanderbilt holding the control over that company through Mr. Fairchild, of Albany, had commenced a foreclosure of that two-million bonds which had never been converted into the other mortgage; after we found we couldn't get the parties altogether and consent to this agreement to give up their bonds and take another kind of payment, we allowed this foreclosure to go on and the property was

sold under it; Mr. Fairchild foreclosed it, employed by Commodore Vanderbilt, and when it was purchased Mr. Duncan made the purchase of the part in New York through his clerk, Mr. Hull, and I made the purchase in Vermont through my cashier, Mr. Lincoln, without any agreement with the bondholders or understanding with any of them, but with that understanding between ourselves that whatever we got out of it, being two large bondholders, everybody else should have the same advantage; in other words, it was the only way to get around this difficulty and give this title to the New York, Boston and Montreal, and we wanted the power all in our hands, but we made no bargain with any other bondholders but bid it in, and they might take their proportion of the money that was bid in or they might join us; that was our understanding; there was no agreement because it was necessary for us to keep it in our own hands to carry it out; that was in 1872; in 1872, after doing this, we had acquired a perfect title of both roads, Mr. Duncan and myself, because I had purchased the north end of the Lebanon Springs road and the whole of the Bennington and Rutland road; Mr. Duncan had purchased the New York end of the Lebanon Springs road through Mr. Hull; then we owned the title and wanted to get it in the hands under the arrangement of the New York, Boston and Montreal, so to do that to secure ourselves we did not want to take a risk if they failed; they had a great deal of work to do and we wanted to get our road back or get our money.

and we had Mr. Hull and Mr. Lincoln, who held the legal
530 title to both roads in fee, free from any incumbrance except this $500,000 mortgage of Vanderbilt's on the north end, to give Mr. Duncan and myself a mortgage of $5,000,000, which would be enough to cover in cash value what we should receive from the New York, Boston and Montreal, and then to convey this to the New York, Boston and Montreal subject to the mortgage of five millions; the trustees of the New York, Boston and Montreal that we assigned this mortgage to, we gave them the power to cancel it on the payment to us of this twenty-seven hundred thousand—if that is the sum, about that in money, and the balance in second mortgages, and that was the shape it assumed in 1872; that the New York, Boston and Montreal acquired the fee to both roads subject only to a mortgage to Mr. Duncan and myself of five millions, and that mortgage in the hands of their trustees, of Brown & Co., the bankers, and Seligman & Co., with the two trustees to distribute the money that was raised to carry through this New York, Boston and Montreal, and our only interest in it, either Mr. Duncan's or my own, or the bondholders of the Lebanon Springs road was in their making the payment, and I think it gave us about fifty-seven cents on the dollar in cash on our bonds, and the balance in second-mortgage bonds, and that Mr. Duncan and I agreed to receive, and that of course we intended to give to the bondholders; we have always denied any agreement that we were their trustees, at the same time we always admitted that our intention was and is that they shall share with us; the New York, Boston & Montreal commenced negotiating their bonds in London through Bischoffs-

heim and others, and the first money that came to those trustees, they paid over our portion to us, which was a certain per cent. from time to time of the payments, and I think they paid us about $700,000 to Mr. Duncan who was the real trustee, and I was only in name, but I signed the receipts with him; in the sale to those parties we agreed to
531 assume all the floating debt there was against these roads, and it took a good part of this $700,000 to pay off that floating debt; perhaps it was foreclosed by the mortgage; we didn't know, but we wanted to pay it and we agreed to pay it, and the first money we received from them was paid out to pay these debts, and I believe there was a little balance in his hands that was lost to the parties by the failure of Duncan, Sherman & Co.; then, in about 1874 or 1875, perhaps, the rest of you remember as well as I would, the New York, Boston and Montreal failed, not on account of our road, of course, but the general difficulties, and stopped payments to us; they held our mortgage, the trustees did, subject to discharging it on being paid, or a transfer back to us, and they had paid us, as I say, between $700,000 and $800,000, and between ourselves, Mr. Duncan, and myself we intended to hold this mortgage for the benefit alike all of the bondholders; when they failed or before they failed these two roads were leased to the Central Vermont, of Vermont, the lease to terminate when the other road was built, supposing it was going right through; it was furnishing the present use of the road from Rutland to Chatham until the other road came up to meet us, which never did come, to make it a perpetual lease, as it read, and in 1874, I think it was, the New York, Boston and Montreal road failed; in the meantime we had paid all the floating debt of the Lebanon Springs road; it was out of debt and Mr. Duncan's and my name, through this mortgage of five millions, and we held it for the bondholders; the bondholders would come and talk with us; different ones asked us what we meant, and Mr. Duncan and myself said, "We mean to do by you just what we do by ourselves; Mr. Park is the largest bondholder, Mr. Duncan is next to the largest, and whatever is done by any will be done by you outsiders, only we do the work for nothing because we have a large interest,"
532 and, of course, the bondholders were all satisfied, as far as we know. After the New York, Boston and Montreal failed Mr. Vanderbilt died, and I settled these lawsuits with William Vanderbilt very readily, and allowed him to foreclose his $500,000 mortgage on the Northern road and convert it into a new stock, and I took that which severed the two roads again; that left the Lebanon Springs road just where it was originally, subject to their bonds, and in the meantime we had gotten them out of debt, and the road really in equity belonged to the bondholders, free of all debts.

Mr. HARRIS: When was that?

A. 1874 or 1875.

Mr. HARRIS: The road belonged to the bondholders free of all debt?

A. Free of all debt—well, it belonged to Mr. Duncan and myself through this mortgage, but we held it for them as we do now hold

the mortgage for them; now, you understand the title of that road was in the New York, Boston and Montreal, the fee subject to a $5,000,000 mortgage to myself and Mr. Duncan, the previous mortgage having been foreclosed and absorbed in this mortgage to us, and everybody satisfied as it was; we were the large bondholders and were doing it for our own benefit as well as theirs; in 1876 or 1877 we took these two roads, after Mr. Vanderbilt and I had made an arrangement about the Northern, and I took possession of it and I am running it now; that is my own property.

By Mr. HARRIS:

Q. That is the upper road?

A. The upper road; we left the lower road as it always had been, in the way I told you, and then he gave up being deprived of the upper road.

Q. Who gave up?

A. The Central Vermont gave up the lower road, and it was there without anybody to run it. Mr. R. C. Root——

By Mr. STETSON:

Q. Russell C. Root?

A. Russell C. Root, who owned an interest in a road that con-
533 nected, running from Bennington to Glastonbury, wanted to have this road alone; Mr. Bloodgood, who was an owner of the Lebanon Springs bonds and knew that, and he represented some other bondholders, and he came up and I advised him to take possession of the road; I would consent to it and put it in the hands of Mr. Root; I advised Mr. Bloodgood, and Mr. Bloodgood put the road, with my consent, in the hands of Mr. Root to operate it and keep it in repair, and to not run it in debt, and he was to have anything he could make out of it with the connections there were until we could make some disposition of it, and he was to charge it nothing, and to pay nothing, and we were to take it on a day's notice; he was only a tenant at will; that was the position of it down to the time this suit was commenced before Judge Westbrook.

Q. Let us see if we have the position then at the beginning of the suit; the road at the time the suit began was free from floating debt?

A. Yes, sir.

Q. It was subject to a mortgage of $5,000,000 given to the New York, Boston and Montreal Railway Company?

A. No, given to Mr. Duncan and myself.

Q. By the New York and Boston?

A. No, by Mr. Hull and Mr. Lincoln, before conveyed to them.

Q. And you the mortgagees named in that, ostensibly holding it solely for yourselves, but in reality in benefit of the holders of the first-mortgage bonds, original issue?

A. Yes, sir.

Q. And at that time those mortgage bonds, to the extent of $2,000,000, were held to what extent by you?

A. At the time the bonds got above par and I had sold, and I think I held them, and hold now between $400,000 and $500,000.

Q. How many did Mr. Bloodgood hold?

A. Mr. Bloodgood and his parties had about—parties associated with him, there was Mr. Stewart and other parties—I think they had about $150,000 or $200,000; he can tell you—he is here—and just what they had; and they had an association, and, as soon
534 as they met me and found I recognized all their rights fully, we acted in concert, and I told him to take the possession and I would rather not be bothered with it myself but let him manage it, and he made this arrangement with Mr. Root; now, Mr. Root held it as the tenant of Mr. Bloodgood at will; Mr. Bloodgood, representing the bondholders which we had recognized, might go on and manage it; Mr. Root, I think, run that about two years; I may be mistaken; perhaps it wasn't but a year and a half, and perhaps two years; my memory is not clear on that, but he kept it free of debt, which he was to do, and he took the earnings.

Q. Was the road kept up?

A. He kept the road up; the road had no rolling stock and I furnished him the rolling stock from my road above, and he paid me the rent of it out of the earnings from month to month, and we kept up the accounts from month to month the same as any connecting road; I think he got some of the rolling stock from other roads, but I furnished him what he needed; I had a surplus; he was running that along there quietly until 1879; I don't want to be taken down as being positive on this; it may have been 1880; the Housatonic road, which had talked about this before, wanted to buy this Lebanon Springs road, and build about eight or nine miles and connect their road with it, and then make their line through with another line from Montreal; the trouble was with Vanderbilt, that he had a line by the Hudson River and the Harlem; if he didn't get it over the Harlem, he got it over the Hudson River, and as Wm. Vanderbilt told me, he would rather have the business by the Hudson River; "It has got to come there, if it don't come by your road, than to have it by your road, because on the Hudson River we have low grades, and can haul twice as heavy trains, and by the Harlem we have sharp curves and heavy grades;" the Housatonic wanted to get this road and bring them into line, and Mr. Bloodgood had commenced negotiations, and came to me to know if it would be satisfactory to me, and I told him any-
535 thing would be satisfactory that would get the Lebanon Springs road out where it would run, and run in any line, and I would do with my road anything to help it; of course, I was the largest owner in the Lebanon Springs, while I would turn over the management of it to them; pending this negotiation, and about, as I supposed, we were closing with the Housatonic road, a bill was filed by a man by the name of Sackett, I've forgotten, up there, who was a man who had been used always by Henry Tilden: he got eight bonds, either six or eight bonds, and had brought a bill to appoint a receiver of this road as the owner of either six or eight bonds: that had undoubtedly been gotten up or obtained for the purpose of getting into this

road and I think it originated out of a quarrel that Henry Tilden had with Mr. Root, who was a tenant at will, about some of his freight; this suit was brought before Judge Westbrook; Mr. Root came to me and told me a suit was brought there and he was the only party to it and he had no interest; "Well" I said "go and show that, show you have no interest in it; you are not even a lessee, you have no title to it, no bonds in it. no stock in it and no lease of it; the real parties in interest are Mr. Park and Mr. Duncan, through a very large mortgage, represent this road and own it, and they hold it whatever it might be legally, for the benefit of all the bondholders, the two millions instead of this six or eight thousand;" I believe, after the failure of the New York, Boston and Montreal, a man by the name of Butterfield, growing out of their litigations, had been appointed receiver, and I think they made him a party.

Q. Receiver of the New York, Boston and Montreal?

A. Of the New York, Boston and Montreal; at that time the bondholders of the New York, Boston and Montreal had brought a suit against Mr. Duncan and myself and everybody else to set aside the sale up there and recover back the road up there, so Mr. Butterfield would pay no attention to it; so when they went into
536 court there was nobody to represent the road, claiming any ownership, and filed an answer to that effect; a firm in Albany, friends of mine, who have done business for me, Newcomb & Bailey; Mr. Newcomb came down to New York to see me, and called at my hotel on Sunday, I think it was just after this suit was commenced against Mr. Root, and told me he was employed to appear for Mr. Root; somebody else was employed to appear for this man that represented these bonds, Marvin Sackett, in which he claimed to have six or eight bonds; of course I felt very much disgusted; I knew it was not the interest of any stockholder or any party in interest; when Mr. Newcomb came and saw me, I told him so; I told him we didn't want any receiver; a receiver would run it in debt, and it was being run along safely, and we were negotiating now a sale of it to put it in a line, what we had been struggling to do, and if they appointed a receiver it would undoubtedly defeat that; he said he thought the court would appoint a receiver anyway; What, on $6,000 or $8,000 out of $2,000,000, and all the rest opposed to it, will he appoint a receiver, and the road taking care of itself and not running in debt? Have you a judge here to appoint a receiver?" He said he thought he would, and he wanted Mr. Van Valkenburgh appointed; I told him if the judge was determined to appoint a receiver, we wanted a Housatonic man appointed to help carry out this trade, to sell the road and bring it into line; he said he was committed to Mr. Van Valkenburgh so far that he couldn't go back, and he wished I would consent to it; that he was a good man and would do anything I wanted him to do; I told — that I didn't know anything about it; that it would destroy the road and defeat our plans; there was no necessity for a receiver; all the owners were opposed to it, and if one was to be appointed it was to be one that these very parties who were negotiating and we were about selling it to, would take it; a notice had

been procured from Judge Westbrook to appear in Albany
537 on the next Saturday on this hearing to appoint a receiver.

Q. Notice to whom?

A. To Mr. Root, of course; nobody else was a party, and Mr. Root had disclaimed any interest in it; they were running it on one side; I can tell you a little further about it; I said, "I will be prepared to be up there next Saturday and we will show the judge that no receiver should be appointed, or if one, it should be one that would help the institution along, instead of destroying it;" I was ill and in my bed at the time, and I said I would send up there on Saturday to attend this hearing; on Wednesday I learned by telegraph that on Tuesday at Judge Westbrook's house, five days before, he served a notice on the parties to appear — whether a receiver should be appointed; he had appointed Mr. Van Valkenburgh receiver, and taken a bond, or ruled to take one, from $10,000 to $20,000; I learned—you can inquire of others whether I am right about it—but I learned that the counsel on both sides representing Mr. Sackett and Mr. Root, who really did not represent Mr. Root, had appeared there because they were afraid of our hearing on Saturday, and appeared before the judge and he appointed on Tuesday, two days after—this was the first I heard of it—appointed Mr. Van Valkenburgh.

By Mr. POTTER:

Q. By consent of counsel in this case?

A. On the consent of those two counsel, Mr. Root told me; you will probably have an opportunity to examine him.

By Mr. STETSON:

Q. He is under subpœna to appear here to day?

A. That the counsel who is employed was the counsel of Mr. Van Valkenburgh and not his, because he had no interest in it, and that he had informed the court of it; therefore it was the counsel of the plaintiff representing this six or eight bonds, and the
538 counsel for the application for a receiver applied in anticipation of this notice for Saturday and got on Tuesday this appointment; I didn't go there; I don't know the judge if I should see him—God grant I never shall see him; well, Mr. Duncan, to protect other parties, employed Mr. Bangs—I believe he is your partner.

Mr. STETSON: He was not then.

The WITNESS: No, but is now; and Mr. Bangs and General McCullough, who is a very good lawyer and a son-in-law of mine, and who used to be attorney general of California, he appeared for me, and they went up after this appointment was made and set out the facts to the judge.

Q. Mr. Bangs didn't go?

A. I think he drew his papers and wrote a letter, and General McCullough went up; General McCullough has gone to Vermont and will be back tomorrow night; I didn't go up myself; of course I left it all to him; he went up and finally came down again and

hen they drew up a petition, which, I think, was signed and worn to by Mr. Duncan and myself, representing that we were the nly owners—oh, in the meantime Mr. Bloodgood, who seemed to eel more interest and more anger about it, had been around and ot a subscription signed by a large majority of the stockholders, verybody they could find——

Q. Stockholders or bondholders?

A. Bondholders, protesting against a receiver, and if one was ppointed recommending the favorite of the Housatonic which would help us carry through this trade; "If you appoint an outside receiver we never will get control of it."

Q. That was a majority of the bondholders signed that?

A. It was a majority of the bondholders signed it—and I think it was a very large—Mr. Bloodgood will be able to tell you about it; he brought it to me and I signed it; I am wrong about that; I never talked with any of the bondholders, but I think if they had been seen, all except these two; I don't know of any other confiscating, for that is what it amounts to; he applied, showing
539 Mr. Root, who was in the party, was out; he was only a tenant at will, and his property had been taken away, and he had stepped out, and there was no defendant there than Mr. McCullough; he went up with a petition from Mr. Duncan and myself, sworn to, in which we set out our rights as the real and only parties, representing ourselves through this $5,000,000 mortgage, which would cover the whole property and our recognition, if we were recognized; and we have honor enough to take care of the bondholders, and we owned this mortgage and we were the parties really in interest; Judge Westbrook refused to make us a party; then we petitioned, and first said there was no party in court; Mr. Root had no right there, and we should be brought in parties so we should be heard on the appointment of the receiver to issue certificates creating expense, and all that sort of thing; he refused to make us a party; then we made an application that we might be allowed to come in and answer.

By Mr. SEARLE:

Q. When and where was this application heard?

A. Whether at Albany or Kingston, I don't know; Mr. McCullough appeared, he will be before you.

Mr. STETSON: These will be supplied in detail.

The WITNESS: I only came because I had to go away; therefore we never got into the case, and haven't up to this time; now I want to tell you what was done afterwards, a small bond was taken of ten or twenty thousand dollars, and the first order that was given was to issue receiver's certificates I think of twenty-five or twenty thousand dollars.

Q. By whom was that order made?

A. By Judge Westbrook; those were sold, as it turned out, to Samuel Tilden for eighty or eighty-five, in a very short time, and application was made for these certificates for $350,000, on a road that was out of debt, and it was all that it was worth, too.

Q. What do you mean, that it was all it was worth?

540 A. I mean in the state it was in I would have sold out my interest at that rate; the bonds were selling at that time at twenty or twenty-five cents on the dollar; that would be at the rate of $400,000.

Q. At that time the entire value of the road itself was not over $400,000?

A. The bonds were sold at that rate; I wouldn't sell mine at that rate; they came to me but I wouldn't sell mine; they bought others, and Mr. Bloodgood sold his out, so he has no interest in it, but he has a feeling, as he will show you, more than I have; I knew that the parties not having been heard, that this $350,000 of certificates, of receiver's certificates either operated as a first lien on this road, and wiped out the road which was out of debt and was running, without creating an indebtedness, and we were negotiating to sell it, and it was wiped all out by the issuing of these, or else they were illegal certificates because of the parties before the court, and the parties who received the certificates were swindled out of their money; either the owners of the road lost their money, or the owners of the certificates lost their certificates; these certificates as I understood got in the bank through Mr. Duff.

By Mr. POTTER:

Q. For that issue of $350,000?

A. Yes.

By Mr. STETSON:

Q. By whose order?

A. By the order of Judge Westbrook.

Q. Were you heard on that?

A. No; we had no right in court; were shut out; it was all heard by the receiver's attorney and by the plaintiff's attorney; Mr. Henry Tilden brought a suit, as I saw by the newspaper, and recovered twelve thousand and odd hundred dollars for payments he had made for land damages ten or fifteen years that I knew he had been paid every dollar of, myself and Mr. Duncan knows, and the first we knew that such a suit had been brought or judgment recovered, was in the newspapers, and then the accounts of the receivers,

541 reported to Judge Westbrook and passed, showed that that was allowed and there was twelve or thirteen or fourteen thousand dollars paid where there wasn't a dollar due, as I am able to show you; the accounts so rendered from month to month to Judge Westbrook, of course nobody could be there to oppose these accounts; we were not heard and did not know anything that was coming up; from month to month these accounts of the receiver were returned to the judge to pass and these bonds were taken back; I don't know that Mr. Tilden took these first twenty-five except from hearsay; I guess when you come to inquire you will find it to be so; those were paid back at par, so he got his six per cent. and fifteen per cent. in a short time; then the $350,000 were issued in this bank that had some trouble through Mr. Duff in Boston.

By Mr. MORRISON:

Q. The first issue was not paid before the second?

A. The first twenty-five were paid out of the proceeds of the sale of the second; they got in the hands of a Boston party; I think this Mr. Duff took them; at any rate they got into this bank in Boston, and they paid eighty-five for them, going on the belief that people generally go, and ought to have a right to go, that a receiver's certificate authorized by a court is a good lien on the property; I believe, as a lawyer, that the lien is not worth a cent; that we have got to fight it out in the future; they will lose all that they paid for, or we shall lose the road; Mr. Bloodgood had come to him and wanted him to come to me and join hands with me; the owners of these certificates offered them for sixty cents, then he offered them to me for fifty, Mr. Bloodgood acting for them; then he wanted to know of me—I don't know whether he would have taken it—whether I would give twenty-five cents; I told him I would not give one penny on the dollar; here was a judicial decision that might be repeated again, with a judge knowing all the facts, in which
542 a road that was free from debt, being managed by the parties taken out of their hands and absorbed and used up through a receivership in about a year or less; these receiver's certificates that were issued, the parties that took them were swindled out of them and we had to law them out in the future, and if that was the character of the property and the character of our judiciary, I didn't want anything more to do with them.

By Mr. STETSON:

Q. What was the ostensible purpose for which these certificates were issued?

A. Mr. Root has kept this alone because he felt kindly to us and brought them down to us; the road is losing money every month now; the statement was the road was in bad condition, wanted new rolling stock because it had no rolling stock; that is true, it had none; it was paying its way until we could make a disposition of it, and the road was not in good repair, but Mr. Root had kept it up in as good repair as he took it; I don't think the road is in any better repair than it was; what was done with this $350,000 I don't know.

Q. Have they ever been issued?

A. They have all been issued.

Q. Is the road in any better condition than it was when they were issued?

A. I don't like to testify to things I don't know; I haven't been over the road, and I shouldn't like to go over it, from what I hear of it; I don't think it is in any better condition than when Mr. Root left it; he can tell you the condition of the whole road; I think he just about came out even; I don't think he made any money out of it; he says he didn't, and he says he didn't lose anything; but he would have been glad to have kept it along for the benefit of the real owners until they made some disposi-

tion of it; the result of that is this, I give up my interest in it until we can see whether I have any, but the result of it is this: I owned a quarter of that road free from debt—a little over a year ago paying its way; I own a quarter of it now,
543 with $350,000 of these receiver's certificates against it, and God knows how many more will be issued when they are asked for; I don't think they will issue any more, because I don't think they can get anybody to buy it, because when they are offered at such a discount people will see that it certainly follows that it is barred as against everybody who has previous claims; now I have told you the facts as I understand them; I have no feeling personally, of course, against Judge Westbrook; I do think it is the most outrageous absorption and destruction of property that I have ever heard of in any State in the country; that to take a road that is paying its own way and out of debt, in the hands of the parties waiting to find a disposition of it, and put it into the hands of a receiver under such a bond as that was, and under such circumstances, and issue such an amount of certificates that either swindles the certificate-holders or swindles the road out of their property—that is something I never heard of in any new country, say nothing about New York; I have no feeling against Judge Westbrook except what has grown out of this; but any judge that could make an order of that kind—well, I don't want to—I don't suppose anything this committee or this legislature can do, can relieve us; we have got to litigate it, whether these certificates are a lien against our property; if they are, then we lose the property; if they are not, then the parties lose their certificates, but it is easy enough to find out; I should find out by sending up and getting a copy of all these papers.

Q. That will be taken care of?

A. I tell you from hearsay and my general knowledge; I have given you the history of this road which has occurred because I have lost a good deal of money in it, and I have been in it and know all about it, and I have a road that connects with it now; I have never had any feeling against Mr. Van Valkenburg or Judge Westbrook; I have only a feeling, as everybody else has, to
544 protect his own property, and for his associates and the bondholders, the real parties in interest: the legislature may do as they please; I never made any complaint to this committee, but I knew I was going to be summoned if I didn't come, and I had to go to California on Wednesday, and I came here on the request of your letter.

By Mr. HARRIS:

Q. You admit that this road belonged to the bondholders from your statement?

A No; I have told you just the fact.

Q. Haven't you, from this long rigmarole of a statement you have made here, admitted the road belonged to the bondholders?

A. No, sir; the bonds were foreclosed.

Q. Haven't you admitted in this statement two or three times

that, although you bought it in through a clerk. and Mr. Duncan, through a clerk, and therefore became nominally the sole owners of it, yet you held it for the bondholders?

A. No, sir.

Q. Haven't you admitted that the bondholders, although you bought it in in your name, through clerks, that the bondholders ought equally to share with you in proportion to the amount of bonds which they held?

A. Not as bondholders; our bonds and all bonds were foreclosed.

Q. Wait one moment.

A. Will you let me answer your question?

Q. Haven't you admitted here, in this long complaint which you have made here, of an hour's length, that although you and Mr. Duncan bought this road on a foreclosure through clerks in your own names, yet that the bondholders whom you thus cut off ought in equity to be shared equally with you and Mr. Duncan?

A. No, sir; I haven't said so; I haven't said they ought to share equally; I said that was my intention.

Q. What do you think, ought they not?

A. I think that is what we intend to do.

Q. Ought they not to share?

545 A. Well, I don't know, as some sharp things are done, as they ought to.

Q. Then do you think it is right for you and Mr. Duncan to gobble up this road and deprive the other bondholders of their rights?

A. No; we both thought it would be dishonest.

Q. I agree with you, but that is what you attempted to do, to gobble it up?

A. No, sir.

Q. What made you have your own clerks bid it off in your own names?

A. It had to be bid off in somebody's names.

Q. Have you given the bondholders any writing that they could have any share of it?

A. No, sir.

Q. Didn't Mr. Sackett commence this suit in order to obtain his rights through a court of equity against you and Mr. Duncan?

A. Not that I ever heard of.

Q. Do you know what the suit was for?

A. No, sir; I do not. I knew it was to get a receiver appointed.

Q. Very well; if you don't know what this suit was for, didn't you make inquiries to learn?

A. Let me answer the question you first asked.

Q. I didn't even make an objection here when you told your long story.

A. Let me answer the question you asked; no bondholder has ever called upon me or Mr. Duncan, and a great many have, but what have asked us, what do you intend to do with all this——

Q. I object to the witness going on with another story.

A. We intend to go on and give every bondholder the same interest we have ourselves.

Q. Now, what I ask you is, if you have given any bondholder any paper showing that intention?

A. No; never asked for one; no one ever asked for one.

Q. Didn't Sackett commence this suit?

A. I understand so; he never spoke to me.

Q. For the purpose of having a court declare that the other bondholders——

546 A. I don't understand that that is so; I understood that it was to get the receiver.

Q. Did you never hear that that was the cause of the suit?

A. I heard he claimed the bondholders were the owners, and he was one of the bondholders, and they wanted a receiver appointed.

Q. He claimed that the road belonged to the bondholders and not to you and Mr. Duncan, individually, didn't he?

A. Yes, sir.

Q. Did you say it was commenced against only Root?

A. I understood it was commenced against Root and the receiver, as I understood, of the New York, Boston and Montreal, Mr. Butterfield; Mr. Duncan nor myself were not made parties, and were not allowed to be made parties when we asked to be.

Q. Wasn't the suit also commenced against the Harlem Extension road?

A. They had no interest in it.

Q. The South Coal Transportation Railroad Company, the New York, Boston and Montreal Railroad Company, Daniel Butterfield as receiver?

A. The others have no interest in it; he is the one I told you of.

Q. What made you say the suit was only commenced against Mr. Root, if the others were all made defendants?

A. I didn't tell you so.

Q. What made you state that?

A. I didn't state that.

Q. You didn't state it was only against Mr. Root?

A. No, sir.

Q. If you did so state, or if the committee understood you so, that it was a misstatement, was it?

A. Yes, sir.

Q. You knew better?

A. Yes, sir; I told you the receiver——

Q. You knew better at the time?

A. Yes; I knew Mr. Butterfield was a party.

Q. Did you learn of the suit as soon as it was commenced against these defendants?

547 A. I think I learned of the suit; I think Mr. Root came and told me of it.

Q. I asked you simply if you learned of it immediately after the suit was commenced?

A. I am trying to tell you the truth; Mr. Root called on me very shortly after that—Sunday before the appointment.

Q. I asked you if you learned of it immediately after the suit was commenced?

A. I don't know; but very soon I think.

Q. You knew that Mr. Root had employed a lawyer, didn't you?

A. I understood he was employed by the receiver.

Q. You knew that Mr. Root had a lawyer—Mr. Ostrander?

A. Mr. Ostrander.

Q. Do you know Mr. Ostrander of the city of New York?

A. Yes.

Q. You knew Mr. Root employed him?

A. I did not.

Q. You knew Mr. Ostrander put in an answer for Mr. Root and the other defendants?

A. I didn't know it.

Q. P. W. Ostrander; did you understand he put in an answer for the defendants?

A. No, sir.

Q. Did you have any communication with Mr. Ostrander?

A. There was somebody that was sent to me, I have forgotten his name, by the Housatonic road; if it was Mr. Ostrander, I did talk some and tried to help him.

Q. As I understand you, you had placed Mr. Root in possession of this road and to run the road on his own account, for his own benefit, so only no expense came upon you?

A. Upon the owners, yes, sir; I didn't do it; Mr. Bloodgood did it and I consented to it.

Q. You and Mr. Bloodgood had placed this Mr. Root in possession of this property to run it for his own benefit without any return to you and the bondholders?

A. A very good arrangement.

Q. So only he made no expense to you?

A. Until we saw fit to take it back on a day's notice.

548 Q. Did you advise with any of the bondholders, who you say were equitably entitled to the road with you, that you were giving the road away to Root?

A. Yes, sir; and talked with them.

Q. Who to?

A. J. G. Mills has got fifty or sixty thousand dollars, Mr. Stewart; Mr. Bloodgood did it representing others, and I talked with the towns because I lived in Vermont up there; the Seligmans understood it, and I think a large majority understood it.

Q. Can you give any other names than Mills, Stewart and Bloodgood, if so give them.

A. Yes; Mr. Duncan was one and Mr. Baxter was one, Mr. Selover was one.

Q. Was Mr. Baxter an original bondholder?

A. Yes, sir; one of the parties that purchased from me; I couldn't call them all now without reflecting; if I could see the list I could run it over.

Q. Did you advise with Mr. Sackett?

A. I never knew he had any, only this—and he only had this a short time before.

Q. Did you advise with Mr. Sackett?

A. No.

Q. Did you know he commenced the suit not only for himself, but on behalf of the other bondholders?

A. I knew it was stated so.

Q. What made you say to the committee that he commenced the suit alone for himself, and he only held seven or eight thousand dollars' worth of bonds?

A. That I understand to be the fact.

Q. You understood at the same time he commenced it for all the other bondholders?

A. Without their consent and against their protest.

Q. Can you name a single bondholder that protested against his commencing a suit?

A. No; until after it was done I don't know of any that knew of it.

Q. If you know of one, name him, that protested against his commencing a suit on behalf of all the bondholders to get this property back from Root?

A. He was ready to get it back on a day's notice.

Q. You had given it to Root?

549 A. No, sir; Bloodgood did it, with my consent; I said I consented to it.

Q. What right had Bloodgood to give this road away?

A. Nothing except the representative of a bondholder.

Q. That was all the right he had to give it away?

A. Yes, sir.

Q. It was given away to Mr. Root, to make out of it all he could, and make no return to the bondholders, so only he did not make any expense to you?

A. Yes, sir; and that was a very good plan.

Q. Mr. Bloodgood, you say, undertook to give this to Mr. Root upon these conditions, on behalf of himself and some other bondholders that he represented?

A. Yes.

Q. Was Mr. Sackett consulted?

A. Mr. Bloodgood didn't know, so he told me, that Mr. Sackett had any; and I think Mr. Sackett bought for the purpose of this suit.

Q. Was Henry A. Tilden represented?

A. I understood he furnished——

Q. Were either of the Tildens represented in this giving of the road away to Root?

A. No, I don't know that they had any bonds; I don't think they had.

Q. Then you don't know their consent was asked?

A. No; I don't think they had any bonds.

Q. How long did Mr. Root run the road this way?

A. I told you I couldn't remember; it might have been a year, and it might have been two years.
Q. And the road had no rolling stock?
A. No, sir.
Q. You furnished the rolling stock?
A. A portion of it; a portion he borrowed of a rolling stock company.
Q. Did he buy any rolling stock?
A. No.
Q. Whatever he had to run the road he borrowed?
A. Yes, sir.
Q. He paid you a rental for the stock?
A. Yes, sir.
550 Q. Did the bondholders get anything?
A. No, sir.
Q. After the suit was com enced, and before a receiver was appointed, did Judge Westbro make an order referring it to Theodore B. Gates, of this city, t amine you and Mr. Duncan?
A. Yes; but did not exa ie us.
Q. That was after the suit was commenced and before a receiver was appointed?
A. Yes, I——
Q. Were you examined?
A. I must have an opportunity to tell the truth.
Q. Were you examined?
A. I don't know.
Q. (The stenographer read the question.)
A. That is, whether I knew that this man was appointed; the lawyer from Albany, Mr. Newcomb, came to me and told me he was down here to attend to the examination of myself and Mr. Duncan, and after I had told him the facts and my position to this, he told me that he should not have the examination.

By the CHAIRMAN:

Q. Was that the first knowledge of the existence of the suit you had?
A. Oh, no; Mr. Root had told him before that; but it was the first knowledge that this Saturday was fixed.
Q. That was the first interview you had with Mr. Newcomb?
A. The first interview I had with Mr. Newcomb and the only one I ever had on this subject.
Q. Where was that?
A. That was at the Buckingham hotel, where I boarded.

By Mr. HARRIS:

Q. What time was that?
A. I couldn't tell you; it was the Sunday before the receiver was appointed.
Q. He told you an order was issued to examine you?
A. Yes.
Q. Were you examined?

A. No, sir.

Q. Was Mr. Duncan examined?

A. Not that I know of; I guess not.

551 Q. Do you know why?

A. Yes, I know what Mr. Newcomb told me; you want to know that?

Q. I want to know this, when this Sunday was?

A. This Sunday was the Sunday before the Tuesday that the receiver was appointed.

Q. Was that the first you knew that an order was made to examine you?

A. Yes, sir.

Q. The Sunday before the Tuesday that the receiver was appointed?

A. Yes, sir.

Q. That was the first you knew that there was any order made to examine you and Duncan?

A. Yes, sir.

Q. What did Mr. Newcomb tell you?

A. Mr. Newcomb told me that the judge had appointed, either on his motion or the other man's, I don't know whose motion, he told me whose, to have an examination of Mr. Duncan and myself for the purpose of ascertaining who the real owners of these were, to know who were the proper parties to the suit; I told Mr. Newcomb fully just what I had stated to this committee, and Mr. Newcomb says: "I came down to attend to it and from what you have told me I don't want to examine you and shan't examine Mr. Duncan."

Q. Do you know Judge McClellan of Columbia county?

A. No, sir; I presume I have seen him, but I have no acquaintance with him.

Q. Did he communicate with you about this suit?

A. No.

Q. You know he was the man that commenced the suit?

A. I believe I did.

Q. For Mr. Sackett and bondholders?

A. I presume so; I have forgotten about it, but I believe he was the man.

Q. You knew Mr. Newcomb didn't have anything to do with the plaintiff in commencing the suit; you heard it was Judge McClellan and Mr. Andrews, of Hudson, that commenced the suit?

A. I understood it was not Mr. Newcomb who commenced the suit.

552 Q. Didn't you know it was Judge McClellan who commenced the suit for Mr. Sackett?

A. I say I think I did, but I am not certain.

Q. You knew that Mr. Newcomb only appeared with Mr. Ostrander for the defendants, didn't you?

A. I don't know that Mr. Ostrander appeared.

Q. You knew that he appeared for the defendants?

A. No, I did not.

Q. You didn't know which party he appeared for?

A. No; I knew Mr. Newcomb appeared, and I understood he was paid by Mr. Van Valkenburgh.

Q. No; before the receiver was appointed?

A. I don't know Mr. Ostrander appeared; if he did it is news to me.

Q. You didn't know who appeared for the defendant-?

A. What I heard was Mr. Newcomb was the only man; I never was there.

Q. You heard Mr. Newcomb appeared for the defendants?

A. Appeared for Mr. Root, with the understanding that Mr. Van Valkenburgh would pay him; that is what I heard.

Q. Mr. Van Valkenburgh hadn't been appointed receiver when he appeared?

A. No.

Q. When Mr. Root's answer was put in you knew Mr. Root and other defendants answered the complaint?

A. You asked me a question before I have a chance to answer another; I will tell you the truth; I know the truth and you won't find it contradicted; you asked me what I knew about the appearances there.

Q. No, I asked you this, if you didn't know that they had put in an answer before the application for a receiver?

A. At just what time the answer was put in I don't remember, but I understood from Mr. Root and Mr. Newcomb both that an answer was put in by Mr. Root in which he disclaimed any interest or right in it and stated who the real parties were.

Q. Then you understood an answer of some kind had been put in?

A. Yes, sir.

Q. Before the application for receiver,?

553 A. I don't know about that; I think I heard it the same time.

Q. Did you understand it this Sunday?

A. I think I did.

Q. You knew receivers had not been appointed then?

A. Yes, sir.

Q. Then it was before a receiver was appointed?

A. Yes, sir.

Q. That an answer had been put in?

A. The court had been informed——

Q. Didn't you understand that the plaintiff and the plaintiff's attorney had moved for a receiver?

A. I understood, of course, they moved for it.

Q. It wasn't, then, the defendant- that moved for a receiver?

A. No.

Q. It was not the defendants' counsel, Mr. Newcomb, that moved for a receiver?

A. No, but he told me that he was pledged to Van Valkenburgh.

Q. It was the plaintiff that moved for a receiver and the plaintiff's attorney?

A. I so understood.

Q. Then it was not Mr. Newcomb or the defendant- that moved for a receiver?

A. I understood from Mr. Newcomb that it was him that favored Mr. Van Valkenburgh.

Q. But the plaintiff and the plaintiff's attorneys had moved for the receiver?

A. So I understood.

Q. Then the question came who should be the receiver?

A. Yes, sir.

Q. Didn't you understand Judge McClellan himself moved that Mr. Van Valkenburgh be the receiver?

A. I think they both agreed to it; I understood so.

Q. He moved for a receiver and he nominated Mr. Van Valkenburgh?

A. Yes, sir.

Q. And Mr. Newcomb and Mr. Ostrander assented to it?

A. Yes, sir; not Mr. Ostrander.

Q. Well, Mr. Newcomb on the part of the defendants?

A. Yes, sir; as he appeared.

554 Q. When the receiver was appointed, didn't you withdraw your stock from that road and leave it entirely naked, so it couldn't be used?

A. No, I took off everything to protect myself.

Q. Didn't you take all off that Mr. Root had obtained from you?

A. I don't know; I took off a good deal of it; I wasn't there; I will tell you the order I gave; I sent up to my superintendent——

Q. I don't ask you what you sent up; did you take away from the road all of the rolling stock?

A. I can't answer you; I was here; I gave my instructions to the superintendent and I presume he obeyed them.

Q. Then he obeyed your instructions to take all off from the road?

A. I gave instructions.

Q. What instructions were they?

A. I told him that the matter was changed and gone into the hands of a receiver, which left us without security, and I wanted him to get the property that belonged to our road back into Vermont, under our own control, that we had been leasing to Mr. Root personally, and whether they did get it all back I don't know.

Q. If he did get it then that left the receiver without any equipments for the road, didn't it?

A. Oh, yes; all I know of.

Q. He couldn't run the road without making some provision to obtain the rolling stock, could he?

A. No; and you will find what he did if you will look at the accounts.

Q. Do you mean that in answer to my question?

A. I don't know of any way—I didn't know of any way without rolling stock.

Recess.

Afternoon Session.

TRENOR W. PARK, recalled:

Mr. STETSON: Mr. Park wishes to make an explanation before he goes on.

CHAIRMAN: All right.

The WITNESS: I understand that this judgment that I spoke of, that was recovered by Mr. Tilden, instead of being $12,000
555 was $22,000; Mr. Root was here and I had forgotten about the amount, and another judgment by Mr. Sackett, who was the plaintiff in this suit, of $2,000 and over, and another one of a friend of theirs, and they had it all their own way, so they got judgment of about $26,000 or $27,000, which of course none of the owners of the road knew anything about or had any right to appear to oppose; we tried to get in.

By Mr. HARRIS:

Q. Is this a supplemental complaint?

A. I said it was $12,000.

Q. Who defended those suits of Tilden & Co.?

A. I don't think they have been defended.

Q. Wasn't there a trial at the circuit?

A. I don't know.

Q. Was there any judgments recovered at the trial of the circuit?

A. I never heard of a judgment until after they were rendered.

Q. You don't know whether there was a trial or not?

A. I don't know.

Q. You know no judgments were recovered?

A. I soon knew we had no opportunity to defend them.

Q. When we took the recess, I was asking you about your taking away this rolling stock; after you had taken it away, I understood you to say that there was no means of running the road; was I right?

A. I say there were no means of running the road without rolling stock.

Q. And you had taken away the rolling stock?

A. I don't know that we are taking it all away.

Q. You had directed your superintendent to take it away?

A. I don't know anything about it; if you would allow me to give my impression.

Q. You had directed your superintendent to take it away?

A. That is to this extent, to *effect* us against the loss of the rolling stock.

Q. Now, while Mr. Root run it and your rolling stock, and
556 paid you a rental for it, he made no returns to anybody except to pay your rental, did he?

A. What kind of returns?

Q. For the earnings of the road?

A. Yes, he told me every week; he made a return every week of the earnings and expenses.

Q. To whom?

A. To me; not because I had a right to require them; I don't know but that it was but once a month.

Q. Did he pay you the rental for anything but the rolling stock?

A. No.

Q. How much did he pay you?

A. I charged him less than the usual rate; I don't know how much; I made it as low as I could.

Q. How often did he pay you?

A. Every month.

Q. How long did he run the road?

A. I couldn't tell you.

Q. A year?

A. I should think it was over a year.

Q. Two years?

A. Well, I don't know; he can tell exactly and I can't; I won't undertake to say.

Q. During that time did the bondholders get anything?

A. No, sir.

Q. Did the road run down?

A. I don't think it did.

Q. When this suit of Sackett's commenced, was not the road in a dangerous condition?

A. Yes, it was when Mr. Root took it.

Q. It was when Mr. Sackett's suit commenced?

A. Yes, sir.

Q. The bridges were dangerous, were they not?

A. Yes, and are now.

Q. They were then?

A. I say they were and are.

Q. When Mr. McClellan applied upon behalf of Mr. Sackett, as receiver, do you know that the courts ordered a skillful engineer to go over the road and make a report as to its condition?

A. No, I do not.

Q. Did you ever hear of it?

A. No.

Q. Did you ever hear of it?

A. No, I didn't hear of that; I will tell you what I did hear of.

Q. Do you know James H. Jones?

A. No, sir.

557 Q. Did you ever hear of him as a railroad man?

A. No, sir; I don't remember.

Q. The answer which Mr. Root put in, did you not hear what he had sworn in his answer from your son-in-law, Mr. McCullough?

A. I don't know whether I heard it from him or Mr. Root.

Q. Didn't he, in that answer, claim that you and Mr. Duncan were sole owners of that road irrespective of any bondholders?

A. I don't know that he said that.

Q. Didn't he claim that he was only acting as your agent—you and Mr. Duncan?

A. I don't know; I didn't see the answer.

Q. When you applied to come in as parties in that suit you knew what the decision was upon that motion, didn't you?
A. That is, that it was refused.
Q. I understood you to say that you and Mr. Duncan made application to come in as parties defendant to that suit and defend?
A. Yes, sir.
Q. You heard the decision of that motion?
A. My recollection of it is this——
Q. You heard of the decision?

Mr. STETSON: I submit——
Mr. HARRIS: The question was a simple one.

The WITNESS: In the first place, my recollection is that we sent up a petition signed and sworn to by Mr. Duncan and myself, setting out all the facts of our ownership in it, and asking that the court order that we be made parties to the suit; then I heard that that motion was refused.
Q. You did hear that the motion was refused?
A. Yes, sir.
Q. Didn't you hear that it was refused on the ground that Mr. Root is your agent, and that he had answered for you already in that suit?
A. No, I didn't hear that.
Q. Did you see the opinion?
A. No, sir.
Q. Didn't you understand that there was a written opinion of the judge made upon that motion and delivered?
A. I never saw it.
Q. Did you hear of it?
A. No, I did not.
558 Q. Did you hear of the grounds upon which your petition was denied?
A. No, sir.
Q. Did you appeal from the decision?
A. No.
Q. Why didn't you appeal if you were aggrieved?
A. I was going to tell you.
Q. Will you tell me now why you didn't appeal?
A. The next step that we took after asking we be made parties——
Q. I ask you why you didn't appeal?

Mr. PERRY: I submit his answer will be an answer to that question.

WITNESS: The reason why we then made an application to be admitted to come in as defendants and file an answer?
Mr. PERRY: As a matter of favor?
A. As matter of favor and not by order of the court, and that was refused; then I told my counsel.
Q. I don't ask you what you told your counsel?
A. We didn't appeal.

Q. Do you mean to say there were two applications for you to come in and answer?

A. I think there was; they may have both been made together.

Q. Do you mean to say there were two applications for you to come in and answer?

A. I told you that is my recollection; I may be mistaken; I didn't attend to it myself, but it was well attended to by counsel who will be before you.

Q. If your clerk bid off the property on the sale on the foreclosure sale of the two million bonds, you claim to be the absolute owner of the road, then, didn't you?

A. No, sir.

Q. Didn't you and your clerks give Mr. Duncan a mortgage for $5,000,000 on the road immediately afterwards?

A. Yes, sir.

Q. Didn't you claim to be the owners of the mortgage?

A. No, sir; we always intended it should be held for the benefit of the bondholders.

Q. Didn't you claim that you, with Mr. Duncan, didn't own that five-million mortgage which your clerks gave you—your claim, not what you intended?

A. We claimed we held the mortgage.

559 Q. As individuals?

A. We should give the benefit of it to the bondholders according to their rights.

Q. Didn't you hold that mortgage as your individual property?

A. No.

Q. Do you know a man by the name of Horace Green, of Vermont?

A. No; I don't remember.

Q. Do you remember that he applied for a receiver of the mortgage, five-million mortgage, against you and Mr. Duncan, and took proceedings against you and Mr. Duncan for that five-million mortgage?

A. No, sir.

Q. Do you remember that you opposed his application to have a receiver appointed for that five-million mortgage?

A. If you will let me answer you, it will save you asking a good many questions.

Q. I will repeat the question, and you will answer if we have any jurisdiction here?

A. I don't remember it.

Q. Did you hire counsel to oppose it?

A. None except General McCullough, my son-in-law.

Q. Did you hire Mr. Francis N. Bangs to oppose it?

A. No, sir, I did not; Mr. Duncan did.

Q. Didn't he oppose it in your name as well as Mr. Duncan's?

A. I think not; I think Mr. McCullough in my name and he in Mr. Duncan's.

Q. If you were not the individual owner of that five-million

mortgage and it belonged to the bondholders, why did Mr. Duncan hire an attorney to oppose an application that should go to the bondholders?

A. Because he felt it his duty to protect himself and protect the other interests just as I did.

Q. What did you call the other interests?

A. The bondholders.

Q. The bondholders were applying for it?

A. Eight out of two millions.

Q. I am speaking of Mr. Green, that was more than eight?

A. There was some suits brought, one or two, and I don't know anything about them; it may have been in the name of Mr. Green; I didn't give my attention to the business, I have had
560 enough else to do; I turned it all over to my son-in-law; these main facts I have stated I know.

Q. You didn't give your attention to the business?

A. I did not.

Q. How many suits were brought concerning this road?

A. I don't remember but one more which was of the same interest.

Q. How many suits are there now pending concerning this?

A. I don't know but two; this one and another one.

Q. What was the other one?

A. I have forgotten his name—the same interest.

Q. What county is the venue?

A. I think Columbia county and before Judge Westbrook, and he granted another injunction.

Q. Isn't there a suit in Rensselaer county on the calendar?

A. I don't know that that is in Rensselaer county.

Q. Isn't there a suit now on the calendar for trial in Columbia county and one also in Rensselaer county?

A. I don't know but two suits, this one and another, and don't know which county it is in.

Q. Has this suit of Sackett's ever been tried?

A. I don't know that; we ain't in it.

Q. Mr. Root was your agent, wasn't he?

A. But he is out of it.

Q. He was your agent, wasn't he?

A. No, sir; never was.

Q. You put him in charge of the road?

A. Mr. Bloodgood gave him possession of the road and I consented to it; I had no interest in the suit except to advise him; I will tell you what that was if you want to know.

Q. I would like to have you answer my question?

A. He never was my agent.

Q. You consented he should go into possession of the road?

A. Yes, sir.

Q. Then you leased to him your rolling stock from the upper road?

A. Yes, sir.

Q. You know Mr. Vanderpoel, a lawyer of this city?

A. Yes, sir.

561 Q. Do you know that he appeared in this case?

A. My impression is that he did appear in some form.

Q. Which side did he appear upon?

A. I don't know; it wasn't for me.

Q. Do you know that he resisted your motions—the two motions which you made?

A. What two; as to our appearing in the case?

Q. Yes.

A. No, I do not.

Q. Did you ever hear of it?

A. He may have done it; he did appear there and I think for Mr. Tilden. I think for Mr. Samuel Tilden.

Q. What was the grounds upon which you claimed that the bondholders ought not to have the five-million mortgage?

A. I never did claim it; never did make any such claim.

Q. Didn't you resist their application to get it?

A. I never heard of their application.

Q. You don't know that there was an order that that mortgage be filed in the county clerk's office?

A. In that suit?

Q. I am asking about an application?

A. I don't know of any such thing.

Q. Isn't the five-million mortgage now on file in the county clerk's office?

A. I don't know that; we gave it to the trustees of New York, Boston and Montreal to be discharged on the payment to us, giving them the power to discharge it, and I think they hold it yet.

Q. Did they ever pay you?

A. They paid us.

Q. Did you distribute that amount which you received to the other bondholders?

A. You go along pretty fast; let me keep up with you; you can't disturb me and I will try not to you; you ask me whether they paid us.

Q. And you say they did?

A. No, I didn't; I started to answer and you interrupted me; I started to say they paid about $700,000, according to my recollection, to Mr. Duncan, and that sum was paid to clear off a floating

562 debt that there was against the company; that they purchased the Harlem Extension, and the balance of it that was in Mr. Duncan's hands was lost through the failure of Duncan, Sherman & Co.

Q. That you stated upon your direct examination on giving your story; I am now questioning you about it; they paid to Mr. Duncan $700,000?

A. Something like that.

Q. What did Mr. Duncan pay out as floating debt?

A. I couldn't tell you that.

Q. Do you know any one thing that he paid?

A. Yes, I know a good many things that he paid.

Q. To whom did he make payment of the $700,000?
A. He paid to Mr. Samuel J. and Henry A. Tilden.
Q. How much did he pay?
A. Twenty-five thousand dollars with which to pay debts that had accrued on the line of the road for land damage.
Q. Who else?
A. There was due to those——
Q. What did Mr. Duncan pay?
A. You will have to let me answer your question or I shan't answer.
Q. That is simple enough; what did he pay?
A. I can tell you what debts there were.
Q. I haven't asked that; you have already said that you couldn't tell, and I have asked you what Mr. Duncan paid?
A. Mr. Duncan in another suit has testified according to my recollection about $400,000 or $500,000.

Mr. POTTER: What did the witness say became of the $25,000 that was paid to Mr. Tilden?
Mr. HARRIS: He said they received it, as I understood it; that the Tildens received it for land damages and they never paid it out, but kept it.
The WITNESS: No, I didn't say that; I would like to tell the whole truth if I can.
The CHAIRMAN: Correct your answer; that is the way I understand it.
The WITNESS: When this arrangement was made to sell this out to the New York, Boston and Montreal, Mr. Tilden was sent up, who was then in charge of the road.
563 Mr. POTTER: I just want this answered; what became of the $25,000?
The WITNESS: That was what I was going to tell you; he was in charge of the road; he was asked by Mr. Duncan in my presence to make up a statement of all the liabilities of the road; he went up and made that statement, and I saw the report was about $25,000; Mr. Duncan told him to take a credit of $25,000 and go on and pay it; Mr. Duncan gave him a credit on his book and charged it against the fund; I had nothing to do with that, and when he got through more — half of these debts were not paid; some of them may have been paid and the vouchers Mr. Duncan held, but that was a matter more with him; I knew because some of the claims I settled afterwards that he didn't pay, although he made up the amount and had the money.
Mr. POTTER: I don't understand yet; I simply want to know if you claim Tilden received this $25,000 which he did not pay out as it was arranged he should pay.
The WITNESS: Yes, I do.
Mr. HARRIS: That is the way I understood it before.
The WITNESS: Not all of it; he may have paid some of it; we never got a statement of how much he paid, but some of it I know he didn't, because I have seen a statement of the liability, and those

payments were not made because I settled them afterwards myself, so I know he didn't pay them all, but how much of it he did pay I don't know, because Mr. Duncan, in my presence, made a demand for what he had paid.

The CHAIRMAN: Of whom?

A. Mr. Tilden.

Q. Which Tilden?

A. Moses; and Mr. Tilden refused to give him the statement upon the ground that Mr. Duncan had taken away the charge of the road, not showing him any confidence, and he wouldn't show him anything, but that of course had nothing to do with this lawsuit.

Q. Mr. Duncan paid $25,000 to the Tildens, Samuel J. and
564 Henry A.; now, what other payments did he make of that $700,000?

A. I couldn't, it is years ago, I couldn't answer you without getting a statement.

Q. Do you remember any other payments now yourself?

A. Yes; I remember his paying a claim in Vermont to a western company; I remember his paying—well, I don't know whether he paid it or passed it on his books a claim of over $150,000, I guess.

Q. Who to?

A. Over $250,000 to himself representing this pool that owned the Northern road and the rolling stock, and they had made advances and he paid it, which included Samuel Tilden and Mr. Charleck, Henry Tilden and myself and General Baxter; he managed the whole thing in both suits; you can find that, it is in print.

Q. I am asking for information from you; I am asking to see how much you know about it?

A. I don't know the particulars.

Q. He paid $250,000 to several gentlemen who made a pool?

A. I don't know how much it was; I should think it was about that.

Q. I understood you to have used those figures; $25,000; wasn't I right?

A. No; I said it might have been $150,000 to $250,000.

Q. From $150,000 to $250,000 to the Tildens, Baxter, &c., on account of some pool which they had made?

A. Yes, sir; I can tell you what it was for.

Q. What else did he pay?

A. I couldn't tell you.

Q. Then all we have got that you now remember that he paid out of this $700,000 was in three cases which you have mentioned?

A. That is all that I remember now.

Q. What did he do with the balance, if you know of your own knowledge?

A. When he closed, when Duncan, Sherman & Co. failed, there was a hundred and odd thousand dollars that stood to the credit of Park and Duncan, trustees, that is, he kept the account in our joint names; there was two hundred and some odd thousand dol-
565 lars that was loaned to Mr. Selover on a mortgage on real estate, on bonds in the Lebanon Springs road, and bonds in

the Glastonbury road, believing it was about the same that would be coming to Selover out of this mortgage; I received about $250,000, not out of this, but gave my note for it and gave good securities which stand there now expecting a division among the bondholders of money that would be coming to me.

Q. Why to you?

A. As a large bondholder.

Q. How much did that leave of the $700,000?

A. It didn't leave anything what he had not disposed of.

Q. How much did he receive or keep as bondholder?

A. I don't know that he kept anything in his own name, but I think it was $112,000 that stood in Duncan, Sherman & Co.'s to his credit and mine, and I think there was another sum, but I have forgotten the amount of it, that stood there to the credit; I have forgotten the amounts.

Q. Did any other bondholder get a dollar?

A. There was no other bondholder got a dollar as a bondholder.

Q. No one got any?

A. No, sir.

Q. You got some $200,000?

A. Not as a bondholder.

Q. And Mr. Duncan got some $112,000?

A. Yes; Mr. Duncan had that amount on credit.

Q. No bondholder got anything and yet this mortgage of five millions was, as you say, intended for all the bondholders?

A. Yes, sir; if you will let me tell you——

Q. No, answer my question; wasn't it intended for all the bondholders?

A. It was to protect every one alike.

Q. It was intended for all the bondholders?

A. Yes, sir.

Q. Now while Mr. Root run the road the bondholders got nothing?

A. No, sir.

566 Q. They got nothing out of the $500,000 mortgage which your clerks, that is, the clerks of Duncan & Park gave to Duncan & Park?

A. Yes, they have.

Q. The bondholders have?

A. Yes; by relieving the road of the liabilities which it was subject to.

Q. Have they got anything else?

A. No, sir; no division of it.

Q. Mr. Sackett, on behalf of himself and the other original bondholders, commenced this suit did they?

A. Yes, sir.

Q. For the purpose of claiming in that suit that the purchase by your clerks, that is, the clerks of Duncan & Park, was for the benefit of all the bondholders and not for Duncan & Park as individuals?

A. I don't know what he claimed; he knew better.

Q. Didn't you hear so?
A. No, I didn't hear so, and he knew better.
Q. Wasn't it for the benefit of all the bondholders?
A. Yes, sir; and he knew it was.
Q. Then he was right if he claimed it in his complaint?
A. Certainly.
Q. Then he claimed also that the five-million mortgage which your clerks have given to you, as individuals, belonged to the bondholders, didn't he?
A. It did; you must hear me through, because I am not going to be caught here with an answer; this five millions was first to answer the contract that was made by Mr. Duncan and Mr. Park, representing ourselves and all others with the New York, Boston and Montreal, by which we were to pay off all the outside debt so as to relieve them from it; and there was an outside debt of $400,000 or $500,000 and I don't know but more; Mr. Duncan has made a statement of that in figures and it is in print and I haven't got it; he knows the whole business; while it was done in my name and his, I hadn't anything to do with it; never handled any of the money; at the time of Duncan & Sherman's failure there was $112,000 of this money left in their hands to the credit of Duncan & Park as trustees of this mortgage; there never was any question made by any bondholder that whatever money came out after
567 meeting our obligations that would be paid over to the bondholders in the same proportion we got it ourselves, and nobody ever made any question about that; we told them so and they knew it, and I didn't keep the accounts and I couldn't state the figures because I never paid out a dollar of it and never received a dollar of it; that is from the trustees of the New York and Boston, which was received by Mr. Duncan, and there are a great many matters there that would take you some days that have nothing to do with this; anything I could help you in I am ready to do.
Q. Who is examining you now; who are you answering?
A. I am stating the facts in answer to your questions.
Q. When you get through I will go on.

The CHAIRMAN: Proceed.

Q. Did the mortgage specify that it was for the purpose which you have just now named?
A. The mortgage, I think, was a naked mortgage of five million.
Q. And it had none of those items in it which you have named at all; it is a simple mortgage from your clerks to yourselves?
A. The paper accompanying it did; the mortgage itself did not.
Q. The mortgage was a simple naked mortgage?
A. Yes, sir.
Q. Did you ever consult any other bondholder than Mr. Duncan in regard to the matters you have just now spoken of?
A. Yes, sir.
Q. Who?
A. I can't remember who; I can tell you some of them; I know I talked with Mr. Mills, Mr. Selover and General Baxter, Mr. Au-

gustus Schell, Horace Clark and then the selectmen in certain towns in Vermont, and the trustees or selectmen of certain towns in New York; it is pretty extensive,

Q. Did you tell them that you and Mr. Duncan held this mortgage for them and for their benefit? That is what I want to know.

A. If you ask me if I told it in those words, I say no; if you ask me what I did tell them, I will tell you.

568 Q. Did you tell them that you and Mr. Duncan held this mortgage for them and for the other bondholders?

A. I told you no, not in those words; but I can tell you what I did tell them.

Q. Then to a bondholder whom you didn't see and who went only to the record to ascertain what the mortgage was, he wouldn't know that you held this for him, would he?

A. I guess they all understood it.

Q. He wouldn't know?

A. He wouldn't know from the record, but he could easy enough ascertain it by coming to Mr. Duncan and me, and they pretty generally did.

Q. What counsel did you employ to defend these proceedings that were commenced?

A. Which ones?

Q. The proceedings that you commenced and the proceedings commenced by Green, the Vermont man, to have a receiver appointed of the five millions.

A. I don't know what proceedings you mean.

Q. Of Green to have a receiver appointed of the five millions.

A. I don't remember anything about that question.

Q. You don't remember who you employed to make the application for you to come in?

A. I think General McCullough attended to all my business.

Q. Do you know who he employed?

A. I think he acted on it himself.

Q. Didn't he have an associate counsel?

A. I don't remember that he did, except Mr. Bangs representing Mr. Duncan.

Q. You don't remember that he had an associate counsel?

A. He might have had; if he had, he did it himself.

Q. Do you know how long after Mr. McClellan, the attorney for the plaintiff, moved to have a receiver appointed, how long it was before a receiver was appointed?

A. No; I think it was a very short time.

569 Q. Don't you know it was over a month after the application was made before the appointment was made?

A. I couldn't tell you.

Q. Don't you know that two or three references were made to ascertain the facts after the application was made and before the appointment was made?

A. Never heard of them.

Q. Do you complain because the judge issued certificates to run the road?

A. Yes, sir; I do under the circumstances.

Q. Could the receiver run the road at all without buying property?

A. No, sir; he couldn't run it without property.

Q. Could the receiver get property except by certificates?

A. I don't know how he could have got it; he had no business to be receiver.

Q. I suppose Mr. Sackett had no business to commence a suit on the same principal?

A. I have told the facts.

Q. Don't you think Mr. Sackett, as a bondholder, had no business to commence a suit?

A. He had a right to do it, although it was done for a special purpose.

Q. If Mr. Sackett had a right to do this, had not the receiver a right to run the road?

A. If he got appointed; if you will let me answer that question I will answer it as I think and believe, and then you can draw your conclusion; when it appeared before the court that a majority of the bondholders and the owners of the five millions bonds objected to the appointment of any receiver, and if any receiver was appointed, it was to be one that was to aid them in selling the property they were then trying to sell to the Housatonic road, and in the face of that he refused to let them come in and be heard, and allowed nobody before him that was opposed to it, and either the men that took those certificates were swindled out of their money or we are swindled out of our road; that is the truth of it.

Q. Do you know it appeared before him that a majority of the bondholders——

570 A. I was not before him, but I signed such a paper; you will have the truth I guess; I never saw him.

Q. Then what made you state that it did appear before him?

A. I said I so understood, and I believe you will have the proof here.

Q. A majority of the bondholders opposed the application of Mr. Sackett?

A. Yes, sir.

Q. And therefore you think the judge ought to have denied it if that fact was before him?

A. I am not judging.

Q. Wasn't that your idea?

A. You ask me as a lawyer, and I will answer as one.

Q. You stated that in case a majority of the bondholders objected to Mr. Sackett's suit and the appointment of a receiver, therefore the judge ought not to have granted it?

A. No, sir; I never said it; what I say is this, he didn't have the parties before the court, and would not allow them before the court, that had a right to be heard, and they never have been heard and this order was made without their being heard.

Q. In your opinion, does it make any difference with the course

of judicial action whether a man owns only $7,000, or whether he owns $700,000, as to getting his rights?

A. Probably not, except in the discretion of the court.

Q. If Mr. Sackett only owned $7,000, hadn't he just as much right in the courts to obtain relief and what he was entitled to for that $7,000, as you by owning $700,000?

A. Probably, if he brought the proper parties in court, which he didn't do.

Q. If he hadn't brought the proper parties in court, and you had moved to come in yourself and he had denied that, why didn't you appeal?

A. Because we thought we could defend the certificates outside easier than a judge that was against us all the time.

Q. If a receiver had been appointed, and it was proper to appoint one, then it was proper for a receiver, if he wanted to run the road, to get rolling stock, and in order to get that to issue certifi-

571 cates?

A. If you want to know my judgment about it, I will tell you the whole thing.

Q. You took two hours in giving your judgment and story; I am asking you a simple question; if the receiver was appointed it was right for him to run the road, wasn't it?

A. I don't think the receiver was legally appointed.

Q. If one was legally appointed?

A. If one was legally appointed.

Q. Wasn't it right for him to run the road?

A. Depend on what power the court could give him.

Q. If a receiver was legally appointed to take charge of the property, wasn't it right for that receiver to run the road?

A. If it was by honest practice.

Q. Could the receiver run the road without getting money to equip the road with rolling stock?

A. He could without $350,000, or one-tenth of it.

Q. I am not talking of $350,000 now; could a receiver run the road without expending money in order to equip it in getting rolling stock?

A. No; nobody can.

Q. Could the receiver equip the road and get rolling stock and get money for that purpose excepting by issuing certificates of indebtedness?

A. I don't know that.

Q. Do you know of any other way?

A. I don't know of any other way.

Q. Very well; now, Mr. Park, the amount of certificates in that specified case which I put was all, then, you would complain of?

A. No; I have complained of everything about it; first he had no jurisdiction to appoint a receiver; and in the second place it was the most outrageous decision, if he had the jurisdiction or not to make the order.

Q. How do you know he had no jurisdiction; are you a lawyer?

A. I am, and practiced law a great many years.

Q. You claim to be a better lawyer than Judge Westbrook?

A. No; I don't know what sort of a lawyer he is.

572 Q. You decided he had no jurisdiction, and he said he had jurisdiction, and why didn't you appeal?

A. We will appeal when the certificates come up, and take my chances then.

Q. You stated in the complaint you made before this committee——

A. I haven't made any complaint.

Q. In the story you made here this morning, you stated that he issued an order allowing the receiver to borrow $25,000, didn't you?

A. I believe it was $20,000 or $25,000.

Q. Did you make that statement?

A. That I understood so. and the records show it; I wasn't there, and I didn't know it.

Q. Did you mean to have the committee understand that Judge Westbrook had made——

A. That I understood so, not that I swore to it; I haven't sworn to anything before Judge Westbrook because I wasn't there, but everything I had stated you will find.

Q. Don't you know that $25,000 issue was granted by another judge and haven't you been told so—by Judge Osborne?

A. No, sir; I have never been told so.

Q. Do you know he granted leave to the receiver to issue certificates for $350,000?

A. I heard so; I don't know; yet the records will show.

Q. Didn't you give the committee to understand this, that Mr. Van Valkenburgh, the receiver, had got the money upon the whole amount of $350,000?

A. That he had disposed of the certificates, so I understand.

Q. Do you want this committee to understand that?

A. Not that I saw it; I have no personal knowlege.

Q. Haven't you been informed that he has not yet used the whole amount of that second issue?

A. No; I was told by Mr. Root since I was examined this morning that his last report shows that he is $17,000 in debt.

573 By Mr. STETSON:

Q. You asked him what he understood, and that is a proper answer.

The WITNESS: Only the $350,000 had been offered to me for sale by a party who has got them in Boston.

Mr. HARRIS: Did you state to the committee this morning he had sold for eighty-five?

A. I said I heard so.

Mr. STETSON: Not the $350,000, it was the $25,000?

A. I did hear that those were sold at eighty-five.

By Mr. HARRIS:

Q. Don't you know and haven't you been told he got a much larger amount than that?

A. No.

Q. That he got over ninety?
A. No; I heard he got eighty-five.
Q. Haven't you been told that?
A. No; Mr. Bloodgood told me, and he will be before you.
Q. You understood that the parties who purchased these certificates, those that were sold, were Boston men?
A. I understood so; I never saw them.
Q. They purchased these certificates which you say are worthless, you understood, for over ninety?
A. No, I haven't said they were worthless; I said I thought so and should try to make it out so when they try to confiscate my property.
Q. Was it told to you that the men who purchased it went over the road and valued the property?
A. No, I didn't hear anything about it.
Q. And had an agent from Boston here, a lawyer, to inquire into the validity of the whole proceeding?
A. No, sir.
Q. Wasn't it told to you?
A. No, sir.

By Mr. STETSON:

Q. Now you may make any explanation.
A. What I want to say in this is, the general story that I
574 have told all through is correct; a good deal I have told in the particulars are hearsay with Mr. Root, Mr. Bloodgood, Gen. McCullough and Mr. Van Valkenburgh, the receiver and the lawyer; when you examine them you will find out the minutæ of the matter.

By Mr. HARRIS:

Q. What lawyer?
A. Mr. Newcomb; and the facts Mr. Root has just told me that he never employed Mr. Newcomb; that he was employed by the receiver, and appointing the receiver was on stipulation.
Q. Are you stating it on your own knowledge?
A. No; I am stating from what Mr. Root told me; I am only putting the committee on the point of getting out the facts if they want to.

By Mr. ARMSTRONG:

Q. Did I understand you to say you were offered those receiver's certificates for twenty-five cents on the dollar?
A. No, sir; Mr. Bloodgood—and he is going to be examined—came to me and told me these parties wanted to sell me these certificates; he told me a good many things about the judge that I won't tell here, because I don't think it is proper, makes it look a good deal darker than anything I have said: "If you buy those certificates it will put a good deal of power in your hands; they bought them and paid eighty-five, and they will sell them to you for sixty; I didn't know they had bought them or I would have

stopped them, they are friends of mine; would you give fifty? No. Would you give twenty-five? No, I wouldn't give five cents, because if they can take them and confiscate the road by this it can be done again;" I have made no complaint here; I was called here to state what I knew in regard to it and furnish to you the information, the points from which you can get the facts and the records.

575 By Mr. STETSON:

Q. From all the parties; when will Mr. McCullough be in the city?

A. He will be back tomorrow night; he has gone to Burlington.

By Mr. HARRIS:

Q. Do you say anybody offered you these certificates?

A. Yes, sir.

Q. Who?

A. Mr. Bloodgood.

Q. Did he have them or was he authorized to sell them?

A. I don't know whether he had them; he said he was authorized to sell them; didn't show them to me.

Q. Did he say who it was by?

A. I think he did tell me who it was by, but I have forgotten the name; it was a party I didn't know.

Q. Didn't the receiver offer to carry out this Housatonic agreement?

A. No, sir.

Q. At the Windsor hotel in this city?

A. No, sir.

Q. In the presence of Mr. Mills and others?

A. No, sir.

F. G. SWINNINGTON, sworn for the plaintiff and testified.

Examined by Mr. PAIGE:

Q. Where do you reside?

A. Rutland, Vermont.

Q. What is your occupation?

A. Lawyer.

Q. How long have you been practising that profession?

A. I was admitted in 1878 to practice at the Vermont bar.

Q. Since 1878 has the law and practice in the courts of Vermont been your study and practice?

A. Yes, sir.

Q. Under the law and practice of Vermont how is money to be paid into court and what is the proper evidence of its having been paid into court?

A. An entry on the clerk's chancery docket of having received the amount called for by the decree.

576 Q. A payment into court is to be made by payment to the clerk?

A. Yes, sir.

Cross-examined by Mr. JENNINGS:

Q. In giving the testimony that you have, do you mean to be understood as confining it to the law as it at present exists there?

A. As it has been for a great many years.

Q. You wish to be understood as giving that same testimony with reference to the course and practice as it existed in the years 1872–'3?

A. Yes, sir.

Q. That was prior to the time that you were admitted?

A. Yes, sir.

Q. You think the same practice exists today?

A. Yes, sir.

Q. Now, you don't mean to be understood as saying that the absence of a statement upon the clerk's docket as to any payment, would necessarily justify the presumption that no payment had been made by you?

A. Yes, sir; it is to be presumed there is no payment in the absence of such a record.

Q. Might it not be that the clerk had failed to make such an entry in his docket?

Objected to; sustained; Mr. Jennings excepts.

Q. How much experience have you had with reference to the practice of clerks in this regard?

A. You mean the number of cases that I have had with the clerks of different counties?

Q. I want to get at the facts upon which you found this statement as to the course and practice of the clerks in the State of Vermont?

A. Well, I commenced the study of law with Judge Prout and Col. Walker in 1875; they had a great many cases and important cases for our State, and I was continually examining the clerk's docket from that time down and prior to 1875.

Q. With reference to payments like this—with reference to payments made upon foreclosure?

A. Well, we never——

Q. (Int'g.) Isn't it the fact that in the State of Vermont, 577 the only law which they have with reference to the foreclosure of mortgages is the law of strict foreclosure?

A. That is our practice, strict foreclosure.

Q. Isn't it the fact that no law there authorizes foreclosure and sale of property under a mortgage, and the only way in which mortgages are ordinarily foreclosed is by the old common-law way, strict foreclosure?

A. That is the only way provided for by the statute.

Q. Is that the usual way in which mortgages are foreclosed?

A. Yes, sir; but not the only way.
Q. It is the customary way?
A. Yes, sir.
Q. Cases of any other way being adopted are very rare?
A. Yes, sir.
Q. So the instances in which you would find entries upon the clerk's docket to justify the conclusion you have stated here would be very rare?
A. Certainly; if the cases were rare, of course the payments to the clerk would be rare.
Q. Did you ever have such a case in your practice?
A. Yes, sir.
Q. State it.
A. I was interested in a case of a foreclosure of two hundred thousand dollars of bonds of a marble company.
Q. Was there a sale under that foreclosure?
A. Yes, sir.
Q. Was the purchase price paid into court?
A. It has not yet been but will be.
Q. There has been no entry on the clerk's docket in that case?
A. No, sir; it is not yet concluded.
Q. Did you ever have a case where there was a foreclosure, and the money had been paid into court and the entry made upon the clerk's docket in the way you have testified?
A. Yes, sir.
Q. What was the case?
A. The case of the Fair Haven Hotel property.
Q. That is a case of an ordinary real-estate mortgage?
—. Yes, sir.
Q. Was there a sale under that foreclosure?
A. Yes, sir.
578 Q. And the money actually paid into court?
A. Yes, sir.
Q. Did you ever examine the clerk's docket to see whether there was an entry there of such a payment or not?
A. No, sir; I don't recall making any particular examination in that case; I think Col. Walker attended to that matter personally, but I have no doubt but that is the fact.
Q. Can you testify as to any single case in Vermont in which you have had personal experience, and with which you have been connected and where you have seen such an entry upon the clerk's docket?
A. It is my impression that is the case that I now recall; I may be able to recall others; those cases are rare where we have any other method of foreclosure than of strict foreclosure.
Q. That is the usual way?
A. Yes, sir; it is a farming country and they are usually mortgages on farms and that is the general way; but money paid in to the clerk, the facts should appear upon his docket and a clerk's certificate to the mortgagor of the payment of the money which is recorded.

Q. Is there any statute that regulates that?

A. No, sir; our statutes don't go into the particulars; there are a great many things which are not regulated by our statute which make it necessary, however, for the clerk to do without statutory provisions in order that there may be an official record.

Q. What you have testified to then, rather is your impression as to what the practice should be and would be, than as to any regularly established practice or rule of law?

A. No, sir; I am undertaking to testify as to what the practice and law is.

Q. You have not told of any instance in which you have known of such an entry being made?

A. Well, I have not made any particular examination as to payments of money in to the clerk under a foreclosure by the sale of the property; I mention this case that I was interested in personally.

Q. You said as to that you hadn't actually seen such an entry?

A. No, sir; in that case I have not made the examination
579 so I would be willing to swear that was the fact, but it is my impression that it was, although Col. Walker attended to that matter, and I have no doubt but it was paid in to the clerk and the clerk's entry will show it.

Q. But you don't know it—you hav'n't seen it?

A. I don't know but I have seen it; I can't swear that the clerk's docket will show it.

Q. Is not the testimony you have given rather your impression as to what the practice would be than as to any fixed or established rule of practice?

A. No, sir; I have stated that that is the law and the practice.

Q. Will you give us any single instance in which you have seen any such entry upon which you found this statement that you make?

A. As I say, our cases by sale are very rare and I have not made any particular examination in that direction of the clerk's docket in those particular cases.

Q. Then you cannot state, can you, that this is the rule as founded upon your own personal knowledge or experience?

A. I shall have to make the same answer as already given.

Q. Is that a correct statement?

A. No, sir; I think not.

Q. What is the proper practice?

A. I have already answered that sufficiently, I think.

Q. You have had no actual knowledge or experience that would justify that conclusion?

A. That is the law and practice that whenever money is paid in to the clerk of the court there should be an official evidence of that and an official record and that is made by the entry on the chancery docket.

Q. Have you ever had any actual personal experience or knowledge from which you draw that conclusion?

A. All that I now recall; I have not within a few years.

By Mr. HALE:

Q. Have you a separate court of chancery in Vermont?

A. Yes, sir.

580 Q. And the judges of the supreme court are chancellors?

A. Yes, sir.

Q. And, as I understand you, all proceedings of any importance in a case in a chancery suit are entered by the clerk in his docket?

A. Yes, sir.

Q. By the practice I mean—the practice is that the clerk enters all important proceedings in a cause in the chancery docket?

A. Yes, sir; no doubt about that.

Q. You stated that the only statutory mode of foreclosure in Vermont was strict foreclosure?

A. Yes, sir.

Q. Your court of chancery has the same powers which were possessed by the chancery court in England?

A. Yes, sir; except where modified by our statute.

Q. Is there any statute which deprives a court of chancery of the power to decree a sale in foreclosure?

A. No, sir; I will say that the only law we have upon that subject is the case of Sturgis *vs.* Knapp, thirty or forty years ago, where the chancellor seemed to intimate in that case that that could not be done in our State, but we have paid no attention to that dictum.

Q. That was a dictum merely of the chancellor?

A. Yes, sir; we have not paid any attention to that and I don't think it is regarded as the law.

Q. There is no statute prohibiting the chancellor from decreeing a sale in foreclosure?

A. No, sir.

Q. You know Mr. Phelps who appears as solicitor in this matter?

A. Yes, sir; Edward J. Phelps.

Q. A prominent lawyer in Vermont?

A. Yes; I know the gentleman.

Q. A gentleman of high standing in the profession in Vermont?

A. Yes, sir; he was at one time mentioned as a prominent candidate for the Chief Justice of the United States Supreme Court.

Redirect examination by Mr. PAIGE:

Q. Of course, moneys are paid into court in Vermont from many other sources than are realized from the foreclosure of mortgages?

A. Yes, sir.

581 Q. Your testimony as to your individual experience of entries on the clerk's docket of moneys in the questions put to you by Mr. Jennings has been confined to your individual experience as to actions in the foreclosure of mortgages?

A. Yes, sir.

Recross-examination by Mr. JENNINGS:

Q. What other payments do you know of having been made and entered upon the clerk's docket in suits in chancery in your experience; the question which Mr. Paige asked you was with reference to the practice in suits in chancery and not in suits at law; you have testified there were other payments besides the payments in foreclosure suits and of which you had personal experience; what were they?

A. Cases in accounting, and most anything where a bill of complaint can be brought other than in the foreclosure of mortgages.

Q. What case have you in mind where you have been connected with it where there have been such payments made and entries made upon the clerk's docket?

A. The activities of life are very multitudinous and you can get up a litigation in a great many things; there is an action of accounting by bill and there might be an order that the party in default should pay money in an action, or in a partition case.

Q. Have you had any actual knowledge of any such case?

A. I can't recall the name of any such case, but I have had such cases.

Q. In which you have examined the clerk's docket to find the entries of payment which have been made?

A. I can't particularize, but I have no doubt about it at all.

Q. You can't recall any such case?

A. I can't name any case; most of the cases where moneys are paid to the clerk in chancery are by foreclosure, but then there are other cases where moneys are paid.

Q. Do you recall any such case with which you have had actual personal connection or personal knowledge in which such entries have been made?

582 A. The court, in a great many cases, has allowed costs of one party or the other to be paid to the clerk for the benefit of the other party and decreed certain payments to be made, for instance, in an action in accounting or in a partition suit or in a multitude of conceivable cases about which a law case can arise.

Q. You can't recall any such case?

A. I can't give the names of any parties to a case.

Q. Can you think of any such case with which you have been connected?

A. I can't recall just now; I have no doubt there are a great many of them.

Q. You can't be certain that you have examined the docket in such cases?

A. I have not made any examination of the docket in reference to such matters.

Q. Isn't it usual in cases of foreclosure, when there is a sale, which I understand is not very usual at all in Vermont, that the master makes a report of such sale and of the receipt of the money and executes the deed?

A. He wouldn't execute the deed unless he had the order of the chancellor to do so.

Q. He would not until his report was confirmed and the order made?

A. Yes, sir.

Q. But he would usually then execute the deed?

A. Yes, sir; that would depend upon the terms of the decretal order.

Q. Isn't it usual for the receipt to recite the consideration?

A. I should think it would be proper.

Q. If the master reported such a sale, and it was confirmed by the court, and the receipt made recited the consideration, would you conclude from that that the consideration had been paid, even though no entry appeared in the clerk's minutes?

A. You mean to ask me whether that consideration as recited in the deed is conclusive as to the master?

Q. I mean, wouldn't that countervail any conclusion you might make from the fact that no entry appeared upon the clerk's minutes?

A. It would tend to show that the master had some money in his hand which he should turn over to the clerk of the court.

583 It might tend to show that he had received money which he should turn over to the clerk, or which he should pay in to the clerk of the court.

(Mr. PAIGE:)

Q. Well, would it?

A. It might tend to show that.

By Mr. HALE:

Q. It would be an admission on his part?

A. Yes, certainly.

Q. That admission would be entirely consistent with the fact, wouldn't it, that by some arrangement he had given a deed which recited the payment of money, when none in fact had been paid?

A. I don't understand the law of Vermont to be any different from the law in any other place as to that matter.

Q. Would you understand that the effect of the deed would be merely the admission by the officer who executed it?

A. Yes, that is all.

Q. It would not be evidence in Vermont more than it would elsewhere against a clerk, if he was called upon to account for moneys paid into the case?

A. No, sir; I don't understand that.

Q. You don't understand that the deed of the master would be evidence against the clerk?

A. No, sir.

Plaintiffs' counsel also offered in evidence Exhibit No. 27, being the answer of Trenor W. Park in an action brought in the supreme court of the State of New York by Horace Green against Park and Duncan.

Mr. McCurdy then offered in evidence the complaint in the same action which was received in evidence.

Plaintiffs' counsel then offered in evidence from the printed case the proofs taken in the action in the circuit court of the United States for the northern district of New York in which The Central National Bank of Boston was plaintiff, and Rowland N. Hazzard and others were defendants, as follows:

THEODORE C. WEEKS, a witness for defendants, having been first duly sworn, examined by Mr. Fowler, testified as follows:

Q. Please state your full name, age and residence.

A. Theodore C. Weeks is my full name, and has been during the past thirty-five years; Stoneham, Massachusetts.

584 Q. Where did you live in the year 1880?

A. My legal residence, I think, has been in Stoneham for a great many years.

Q. And in the year 1881 where did you live?

A. I don't think my legal residence has been changed for many years.

Q. Where did you do business in 1880 and 1881?

A. No. 54 Devonshire street, Boston.

Q. What business?

A. I think my business in 1881 was the buying and selling of securities.

Q. On your own account, sir?

A. On my own account.

Q. Did you not then do business as a broker?

A. Never as a broker of stocks in my life; I do not think I ever received a commission in my life.

Q. Did you, in the year 1881, know the Lebanon Springs Railroad Company, a New York corporation?

A. I never knew it; I have heard of it.

Q. Have you ever known John W. Van Valkenburgh, the receiver of that railroad?

A. I am acquainted with a man introduced to me as Mr. John W. Van Valkenburgh.

Q. About when did you first make his acquaintance?

A. I was introduced to him, I think, first in the year 1880.

Q. By whom, if you please?

A. I think it was Edward Crane, Esq.; it may have been somebody else.

Q. And who is Edward Crane; is he a resident of this city?

A. I suppose not; I do not know anything about him; he always hailed to be a resident in New York.

Q. What was his business at that time?

A. I really do not know, except from his general notoriety; I know nothing individually of my own knowledge.

Q. Where did you make Mr. Crane's acquaintance?

A. I made his acquaintance in Boston.

Q. Had you known him long at the time he introduced you to Mr. Van Valkenburgh?

A. I do not say he did introduce me to Mr. Van Valkenburgh, but I think he did; I have been acquainted personally with Mr. Edward Crane ever since 1868 or 1869; 1868 I think; and I think he introduced me to Mr. Van Valkenburgh, but I am not sure.

Q. What was Mr. Crane's business in 1866?

A. Philanthropist.

Q. In 1881?

A. Well, he was connected with railroads; I do not know
585 his business, but he was connected with railroads; he was a promoter, I guess that word covers it, a promoter of railroad enterprises; I will state that I know him to have been engaged in that direction at any rate.

Q. How did he come to introduce Mr. Van Valkenburgh to you, do you remember, do you recall the circumstances?

A. How do I know what induced Mr. Crane to introduce him to me; if I remember correctly, if you will allow me to state it in my own way, I will state it exactly.

Q. I should prefer a categorical answer.

A. I could not tell you; you inquire, if I understand the question, how Mr. Crane came to introduce Mr. Van Valkenburgh to me; my judgment is it was a matter of courtesy, I going into a room where he was and he saying, "Mr. Van Valkenburgh, Mr. Weeks."

Q. Did you have any business relations, immediately subsequent to your introduction, with Mr. Van Valkenburgh?

A. No, sir.

Q. Did you ever have any business relations with Mr. Van Valkenburgh?

A. Yes, sir.

Q. In reference to what?

A. In reference to the delivery of some Lebanon Springs certificates to me.

Q. In what year was that?

A. In the year 1881; this introduction was in 1880, the first time I ever saw Mr. Van Valkenburgh.

Q. Was Mr. Crane, the Mr. Crane you have mentioned, in any way concerned with these business relations with Mr. Van Valkenburgh?

A. I had supposed so.

Q. State if you do not remember positively that Mr. Crane introduced Mr. Van Valkenburgh to you, for what purpose Mr. Van Valkenburgh made your acquaintance, if you know?

A. He came to me and said, "I have brought some Lebanon Springs certificates to you to get some money."

Q. Who came to you?

A. John W. Van Valkenburgh.

Q. Was Mr. Crane then with him?

A. No, sir.

586 Q. Now state, if you please, about the time that this conversation took place?

A. May 10th, 1881, in the morning before breakfast.

Q. State all that you remember of the conversation, what he said and what you said?

A. He brought a roll of Lebanon Springs certificates under his arm and said he wanted the money for them; I told him to go down to the office and be there at such a time and he should have it; that was the sum and substance of that conversation.

Q. Was this the first conversation you had had with him in relation to it?

A. The first conversation I ever had with him at all, except to say, "Glad to see you, sir."

Q. You state this conversation took place before breakfast?

A. Yes, sir.

Q. Where?

A. At the Parker house.

Q. Did you at that time know anything of the Lebanon Springs Railroad Company?

A. I never had any knowledge of it, except by hearsay, and by the evidence of its securities; I never saw the Lebanon Springs railroad, and I do not know that it is in existence, except by its securities.

Q. Had you had any prior conversation with Mr. Crane in relation to that railroad?

A. I had, sir.

Q. In Mr. Van Valkenburgh's presence?

A. No, sir.

Q. Did Mr. Crane ever bring you any certificates of the Lebanon Springs railroad?

A. He did, sir.

Q. Were those the same certificates that were brought you by Mr. Van Valkenburgh subsequently?

A. No, sir.

Q. During how long a period of time, subsequent to your introduction to Mr. Van Valkenburgh, did you have business relations with him?

A. You mean subsequent to May 10th, that I spoke of?

Q. Yes, sir.

A. I think I met him afterwards in January, 1882, and at several times during the year 1882 afterwards.

587 Q. State, as near as you can remember, and in the language of the person speaking, if possible, the conversation between you and Mr. Van Valkenburgh in relation to these certificates.

A. Which ones?

Q. The first ones.

A. The first delivery he made to me?

Q. Yes.

A. He came to me to get the money, and I told him to go down to the office, to be there at such a time, and I would give it to him; he said he had got instructions from Mr. Crane, as I understood it, I cannot remember the exact conversation, that he had got instructions from Mr. Edward Crane to deliver to me $300,000 Lebanon Springs certificates at 85; my impression is it amounted to $255,000;

and he wanted the money for them; I told him to go down to the office at such a time, and I would pay him; he came down there and I paid him, and he went to New York, I suppose; I do not know where he went, but he cleared away from my office; he was not there more than fifteen or twenty minutes, I think.

Q. How much did you pay him?

A. I paid him $255,000.

Q. And how did you pay him?

A. I paid him $100,000 in drafts on New York, as near as I can make out; I gave it to him in what he was satisfied with as cash, bank drafts on New York; he wanted it in New York funds, as I understood him, and if my memory serves me correctly, I paid him exactly as he wanted it, $100,000 in checks on New York banks.

Q. Do you remember the bank?

A. No, I do not; my impression is that he was given Pacific bank checks on New York; that is my impression, but I am not sure; I know I gave it to him in cash.

Q. You gave him $100,000 in cash?

A. I gave him $100,000 in that kind of cash—a bank draft on a bank in New York.

Q. And the balance was paid how?

A. For the balance I gave him a credit at the Pacific National bank for $155,000; it was placed to his credit on a loan to
588 T. C. Weeks of $155,000, against $160,000 Lebanon Springs Railroad certificates.

Q. Lebanon Springs Railroad certificates?

A. That is, in other words, I borrowed of the Pacific National bank, made a loan with them; they took my note with $160,000 Lebanon Springs certificates as collateral, and placed the same amount to the credit of Mr. John W. Van Valkenburgh; do I make it clear to you?

Q. So far, sir; now, I want you, Mr. Weeks, to try to remember, if possible, on what bank or banks in the city of New York, these drafts were made payable?

A. It is impossible for me to tell you; it was a bank check on a New York bank, what we call New York funds.

Q. Then you do not mean to be understood as saying you paid Mr. Van Valkenburgh, or handed Mr. Van Valkenburgh, your own check upon any bank in the city of New York?

A. No, sir; I went out and got him New York funds; he wanted New York funds, and I went out and got them for him; the Pacific National bank, as I said before, placed $155,000 to his credit, for this loan to me of $160,000.

Q. Did you at that time keep books of account?

A. We certainly did.

Q. And do your books of account show the transactions to which you have referred?

A. Yes, sir; I have a transcript of them right here, as far as this transaction goes.

Q. Have you those books now?

A. Yes, sir.

Q. You have referred to a conversation with Mr. Van Valkenburgh, when these certificates were brought to you, and to some arrangement with Mr. Crane; repeat again, if you please, just what Mr. Van Valkenburgh said?

A. As near as I can remember it, the sum and substance was that Mr. Crane had sent him over with $300,000 of these certificates to get the money; he understood Mr. Crane had made some arrange-
589 ment with me that I should buy them, or something of the kind, and his instructions were to deliver them to me upon the payment of 85, 85 per cent.

Q. Eighty-five cents on the dollar?

A. Yes, sir.

Q. Had you previously had a conversation with Mr. Crane in relation to these very certificates that were brought by Mr. Van Valkenburgh?

A. Previous to this morning I speak of?

Q. Yes.

A. I had, sir.

Q. Did that conversation relate to these certificates?

A. It did.

Q. Was there more than one conversation with Mr. Crane?

A. Oh, I think not; there may have been; I do not know, I do not remember now, whether there was more than one or not.

Q. Had you any agreement in writing with Mr. Crane in reference to those certificates?

A. No, sir.

Q. Did you ever have any agreement in writing with anybody in reference to those certificates?

A. Not that I know of, except as having written them on my note as collateral security, if you call that an agreement.

Q. How many receiver's certificates did Mr. Van Valkenburgh deliver to you at that time?

A. Three hundred thousand dollars' worth of the certificates.

Q. Do you mean $300,000 par value?

A. $300,000 par value.

Q. In what denominations?

A. My impression is they were all $500 certificates.

Q. Were those certificates numbered in any way?

A. I think they were, yes, sir.

Q. Have you any reference upon your books of account to the numbers of those certificates?

A. Yes, sir; I have got it right here, too. They were $500 certificates, according to the transcript from my books, Nos. 33 to 632, inclusive. I believe that to be true, because it is what my books say.

Q. And are these the same certificates that Mr. Crane had a conversation with you about, prior to your seeing Mr. Van Valkenburgh for the first time?

A. I cannot say as to that, sir; I can simply say this, as
590 explanatory of that, that Mr. Crane never had any talk with

me about any particular numbers of bonds; I bought of him, arranged with him, bargained with him, and Mr. Van Valkenburgh delivered me $300,000 according to that agreement, at 85; these were the ones that were delivered.

Q. If you did not give your own check for the $100,000 that you have referred to, you must have procured the draft of some bank in this city for that amount, is that not the case?

A. I have said I did procure it; I gave him a bank draft.

Q. Did you purchase the bank drafts you have referred to?

A. What do you mean by purchase? I do not understand what you mean by purchase; do you mean to ask did I pay a premium for them?

Q. How did you get the drafts for $100,000?

A. Well, my impression is now that I went over to the Exchange bank and got their draft on New York for $100,000 as against a loan on some, if I remember correctly, what is known as the Burdell, Boston, Hartford and Erie bonds; I think I went over there and got $100,000, using those bonds as collateral, that is my impression, that I got a draft on New York for $100,000; I am telling you this from memory; I believe it is so; do you want to know what further I did? Shall I go on?

Q. Yes, if you choose.

A. My impression is that I took that draft and went over to the Pacific National bank; my impression is he wanted it split up a little, didn't want it all in one; he wanted it in some particular way, at any rate—and I generally pay people as they want it—and I think I went over to the Pacific bank, that is my impression, I cannot swear to it, but I am pretty sure I did, and carried the draft of the Exchange bank over to the Pacific, and obtained their drafts on New York for smaller amounts, split up; that is my memory.

Q. And what did you do with the drafts of the Pacific bank for $100,000?

A. As I said before, that is the way I paid Mr. Van Valkenburg.

Q. You handed them to Mr. Van Valkenburgh?

591 A. Yes, sir; I paid Mr. Van Valkenburgh, according to my books, cash that day, May the 10th, $100,000.

Q. Are you able to state from memory, Mr. Weeks, exactly what you did with the 600 certificates of the receiver of the Lebanon Springs Railroad Company, which you state Mr. Van Valkenburgh delivered to you?

A. When?

Q. In detail, at any time after they came into your possession?

A. My recollection is, as I have told you, that I put $160,000 of them over in the Pacific bank on the day that Mr. Van Valkenburgh got that credit placed to his credit; and then I took them up from there from time to time—the exact dates I can give you if you desire—and paid that loan.

Q. Will you be kind enough now to state what you can from your recollection without reference to any paper?

A. Well, I took them up from there from time to time, borrowed

money on the street, had them in my box, twisted them around in various ways, until they finally landed over in New York.

Q. You have accounted for 320 of the certificates of the par value of $160,000; now state, if you recollect, what you did with the balance?

A. I am trying to explain it, as far as I can. I kept some in my box, and used them as collateral in various places, and sold some; I remember of selling to Mr. Benyon, president of the Pacific bank, fifteen of them; that is my memory; I remember that transaction of selling that amount, that I did sell $15,000; I remember from memory that I sold some to Edward Crane in the year, from memory, I should say, 1882; I sent a man up to Springfield, I know, with a lot of bonds; I think there may have been eighteen or twenty, perhaps less.

Q. What do you mean by bonds?

A. These receiver's certificates, these Lebanon Springs receiver's certificates; from memory, I am telling you I sent a man up to Springfield with eighteen or twenty thousand, somewhere in
592 that neighborhood, of these securities, which I delivered, or caused to be delivered, to some institution at Springfield, on the account of Edward Crane; if I remember correctly, I charged them to Mr. Edward Crane, and he brought me back, the man did, a certain sum of money as agreed upon.

Q. Do your books show in detail exactly what became of those certificates?

A. Oh, yes, undoubtedly; I will go on further from memory; I afterwards disposed of $225,000 of them, that were pledged as collateral, through a foreclosure sale; you want to trace out these particular 300; but I will say, so you will not misunderstand me, that I had other certificates which came in other ways, in and out, besides the 300; you want to know what actual disposition was made of this particular 300?

Q. Yes, sir; I want to know all about your dealing with these certificates in the first instance, these particular certificates you received from Mr. Van Valkenburgh?

A. These particular 300?

Q. Yes, sir; where they went to in the first instance?

A. I told you where they went to in the first instance long ago.

Mr. LAROCQUE: I occupy the same position as to this as to the other record offered.

It is understood that copies may be used instead of the original.

Mr. Hale objects to the evidence of the witness Weeks at page four, as to what occurred between himself and Mr. Van Valkenburgh in reference to the purchase of the Lebanon Springs Railroad certificates, as immaterial and incompetent. Also, that the judgment in the case of Sackett against Root, establishing the validity of these certificates in the hands of the defendant, and the judgment in a case in the U. S. circuit — of the Central National Bank of Boston and others, is conclusive, and in this action the circumstances of the sale of the certificates is not being inquired about.

The same objection is made in behalf of the defendants Foster and Hazard.

Objection overruled; exception.

593 Mr. Paige read the testimony of William T. Hayes.

WILLIAM T. HAYES, a witness for defendants, having been first duly sworn, examined by Mr. Fowler, testified as follows:

Q. Please state your full name.

A. William Thomas Hayes.

Q. How old are you?

A. I was forty-six years of age last September.

Q. Where do you reside?

A. In Somerville. Mass.

Q. What is your employment at the present time?

A. I am in the employ of the receiver of the Pacific National bank at the present time.

Q. Before you went into the employment of the receiver of the bank, were you in the employment of the bank itself?

A. Yes, sir.

Q. Are you familiar with the books of accounts of the Pacific National Bank of Boston?

A. Yes, sir.

Q. Have you examined the books of accounts of the Pacific National bank?

A. Yes, sir.

Q. Do you discover any account whatever kept with John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company in the year 1881?

A. No, sir.

Q. Is there any account on the books of the bank in the year 1881 with Edward Crane?

A. I could not see any.

Q. You mean to say that there is none?

A. As far as I have looked I could not find any.

Q. Is there any account on the books of the bank in the year 1881 with Theodore C. Weeks?

A. No, sir; that is, nothing appears in the bank books; at the same time, he did quite a heavy business with the bank.

Q. Were there books kept by the Pacific National bank in 1881, showing the certificates of deposit issued by that bank?

A. Yes, sir.

594 Q. Do you produce these books?

A. I have them here.

Q. Examine the books showing the certificates of deposit issued by the Pacific National bank after May 1st, 1881, and point out, if you please, any certificates of deposit issued by that bank to John W. Van Valkenburgh or John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company.

Witness examines the books and finds certain stubs of certificates, as follows:

$5,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1787. (In pencil) Paid June 23d.

Read in evidence.

$10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1788. (In pencil) Paid June 10th.

Read in evidence.

$10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1789. (In pencil) Paid May 31st.

Read in evidence.

$10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1790. (In pencil) Paid June 11th.

Read in evidence.

595 $10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1791. (In pencil) Paid May 21st.

Read in evidence.

$10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1792. (In pencil) Paid May 31st.

Read in evidence.

$10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1793. (In pencil) Paid June 13th.

Read in evidence.

$10,000. MAY 10TH, 1881.

Deposited by J. W. Van Valkenburgh.

In favor of self.
No. 1794. (In pencil) Paid June 14.

Read in evidence.

Q. The "paid" refers to the time when the certificates were surrendered on payments made in drafts or cash or in some other way?
A. That is what I always have supposed it was.
Q. Have you looked all through the books showing the certificates of deposit issued by the Pacific National bank down to the date that the bank ceased to do business?
A. I commenced at May, 1881, and went down to the final closing of the bank on the 20th of May, 1882.
596 Q. Do you find any other certificates issued to John W. Van Valkenburgh, or John W. Van Valkenburgh as receiver, than those that you have given in evidence?
A. No, sir.
Q. Are you able to state whether John W. Van Valkenburgh, or John W. Van Valkenburgh as receiver, appears as a creditor on the schedule of creditors of the Pacific National bank?
A. He does not.
Q. Are there any other entries on any of the books of the Pacific National bank showing any other transaction with John W. Van Valkenburgh, or John W. Van Valkenburgh as receiver, than those that you have given in evidence?
A. Not that I have been able to find out.
Q. When did the Pacific National bank suspend payment?
A. They did business on Saturday, the 20th of May, 1882, up to two o'clock; then the directors had a meeting and voted not to open Monday morning?
Q. The books showing the certificates of deposit issued come down to the 20th of May, 1882, do they?
A. Yes, sir.
Q. Down to the closing of the bank?
A. Yes, sir; there is one certificate here on the 20th.
Q. Had the bank at any other time suspended payment?
A. It had.
Q. When?
A. On the 17th day of November, 1881.
Q. Did it subsequently resume payment?
A. It did.
Q. When?
A. The 18th day of March, 1882.

Cross-examined by Mr. HALE, for the complainant:

Q. You had nothing to do with keeping the books of the bank?
A. No, sir.
Q. And you had no personal knowledge as to the transactions between the bank and Van Valkenburgh?

A. No, sir; those transactions with Van Valkenburgh were nearly a year before I went into the bank; I went in the 20th of March, 1882.

597 Q. You were not in the bank in any capacity before that time?

A. Not in any capacity when these transactions appear upon these books.

Q. Those books which you have presented here show the stubs of the certificates of deposit which have been issued by the Pacific National bank?

A. Yes, sir.

Q. They indicate by whom the deposits were made, and in whose favor the certificates were issued?

A. Yes, sir; that is, in some cases; in some cases they show who the depositor was, and to whose order they are made payable.

Q. It says "In favor of —— ——." I suppose that means the person to whose order the certificates were drawn?

A. Yes, sir.

Q. You have no knowledge as to the accuracy of those books?

A. No, sir; I have not.

Q. When did you make the examination of the other books of which you have spoken?

A. Day before yesterday and yesterday, before these gentlemen came in.

Q. That has been the only examination that you have made with reference to this matter?

A. Yes, sir.

Redirect examination by Mr. FOWLER:

Q. Are all the books kept by the Pacific bank that came into the possession of the receiver at the time when the bank became insolvent now in the custody of the receiver of the bank?

A. I think they are.

Q. None of them have been lost?

A. No, sir; not that I am aware of.

Q. Or taken away?

A. Or taken away; no, sir.

Q. Is there any other person now connected with the administration of the affairs of the Pacific National bank more familiar with the state of accounts of that bank than yourself?

A. I should say that there is one, by the name of Brown, who is on his death-bed; he is not expected to live from one day to another.

598 The witness, after further search, produced the following certificates of deposit corresponding with the stubs, which the counsel now offers in evidence:

The Pacific National Bank

of Boston, Mass.

Countersigned. L. F. COLBY, *Teller.*

$5,000. BOSTON, *May* 10, 1881.

This certifies that J. W. Van Valkenburg has deposited in this bank five thousand dollars, payable to the order of himself on return of this certificate properly endorsed.

No. 1787. J. M. PETTINGILL, *Cashier.*

Endorsed.

Pay to the order of Edward Crane.
J. W. VAN VALKENBURGH.

Pay to the order of John S. Day.
EDWARD CRANE.
JOHN S. DAY.

Five certificates, in same form, of same date, for $10,000 each, and endorsed by the same parties.

Two certificates, in same form, of same date, for $10,000 each, and endorsed as follows:

Pay to the order of Edward Crane.
J. W. VAN VALKENBURG.
EDWARD CRANE.
A. FOLLETT.

Mr. Hale objects to this upon the same ground as to the other evidence. Overruled. Exception.

Mr. Paige read the cross-examination for Mr. Hale, and also the redirect examination by Mr. Fowler.

Also the evidence of Henry D. Hyde.

HENRY D. HYDE, a witness for defendant-, having been first duly sworn, examined by Mr. Fowler, testified as follows:

599 Q. Please state your residence, age and occupation.
A. Boston, age forty-eight: occupation, lawyer.

Q. Have you been a director in the Central National bank?

A. I have been a director in the Central National bank since its formation, and counsel for it as far as it has had occasion.

Q. Were you counsel for the Central National bank in Jan., 1882?

A. I was.

Q. And had you been such counsel in 1881?

A. I had been counsel from the formation of the bank.

Q. When was that bank formed?

A. I cannot give the exact date; several years previous.

Q. Do you know Theodore C. Weeks, a witness who has heretofore given evidence in this cause?

A. I do.

Q. Do you know whether in the year 1881 the Central National Bank of Boston had any dealings with Theodore C. Weeks?

A. They did.

Q. Do you know the character of those dealings generally?

A. In a general statement, as I understand, there were loans made by the bank either to Weeks, or to the Pacific National bank; when made to the Pacific National bank, as I understand, some of them were for the benefit of Weeks, but I am not positive as to that.

Q. Were you cognizant of any settlement or adjustment of the business differences existing between Mr. Weeks and the Central National bank and the Pacific National Bank of Boston in or about January, 1882?

A. I was; I made the settlement as representing the Central bank.

Q. Are you able to state the condition of the accounts between the Central National bank and Mr. Weeks and the Pacific bank on the 2d day of January, 1882?

A. From the 17th day of November, 1881, until the 2d day of January, 1882, not including any interest, there was due the Central National bank from the Pacific National bank and Theodore C. Weeks $815,400, for which the Central bank held checks
600 signed by the cashier of the Pacific National bank on the Eliot National bank for the following amounts, which checks were all endorsed by Theodore C. Weeks:

One check for $250,000, one for $60,000, one for $40,000, one for $10,000, one for $40,000, one for $40,000, one for $50,000, and one for $20,000.

Then in addition to that there were two small checks of the Pacific bank which were not endorsed by Mr. Weeks, one for $3,400 and one for $2,000.

Q. Are those the checks which you hold in your hand and from which you have read?

A. They are, as I understand it.

Checks offered in evidence by Mr. Fowler for dedefendant railway company. Received in evidence and marked Defendants' Exhibits 9 to 18, inclusive.

Now, there was a balance due on a demand loan of $250,000, which I understand was to the Pacific bank. In other words, on the 17th day of November, 1881, when the Pacific bank failed, there was due to the Central National bank from the Pacific $510,000, evidenced by checks on the Eliot National bank, endorsed by Mr. Weeks; $5,400 on checks of the Pacific bank on the Eliot bank without Mr. Weeks' endorsement, and $250,000, a demand loan to the Pacific bank, not bearing Mr. Weeks' endorsement. The total amounting to $765,400.

On the next day after the Pacific bank failed, for the purpose, as stated to the Central National bank, of withdrawing some funds from New York, the Pacific bank sold the Central National bank a draft on the Park Bank of New York for $50,000, for which the Central bank paid the money, and which was not honored, making,

therefore, the total indebtedness on the 18th day of November, 1881, $815,400.

Now, that indebtedness remained until the 2d day of January, 1882, when by a settlement, the obligations were given up and new obligations taken, part by the Pacific bank and part by Weeks.

601 Q. In November, 1881, did the Central bank have any other accounts with Weeks than those which you have given?

A. As I understand, there were two demand loans other than these made to Weeks by the Central bank, one on November 3d, $35,000, with 1,000 shares of Easternlrailroad stock as collateral, and on November 15th a loan of $40,000, with 1,700 shares of Silver Eyelet stock, 2,000 shares Best & Belcher stock, and $10,000 of the par value of the Toledo, Delphos & Burlington Southeastern Division first-mortgage bonds as collateral.

Q. Were these all the accounts which the Central bank had on the 2d day of January, 1882, with Mr. Weeks?

A. As I understand it.

Q. That being so, was a settlement made between the Central bank and Mr. Weeks and the Pacific bank on that day by you?

A. A settlement was consummated on that day; the negotiations which ripened into that had been going on for some time, but it was consummated on that day.

Q. Now, will you please state the basis and terms of the settlement?

A. The terms of the settlement were, that there was due the Central Bank from the Pacific bank and Mr. Weeks the sum of $815,400, not including the demand loans of $35,000 and $40,000, which were not included in the settlement, but stood as originally taken; at first it was agreed that the Pacific bank should pay $500,000 of the total and Mr. Weeks $315,400; the day before, or a day or two before the 2d of January, the Pacific National bank, through a committee of its directors, asked to meet a committee of the directors, with myself, of the Central bank, and we met at the directors' room of the Central bank; they then asked that we would make a discount on the $500,000 that the Pacific bank was to pay, and we had a long interview and discussion about it, and finally we agreed to deduct from the $500,000 $19,701.32. Now, towards the payment of the $500,000, there had been collected $60,596.36 out of collateral which the Pacific bank had given to secure the payment of these loans; therefore, deducting from the

602 $500,000 these two sums, it left a balance of $419,701.32, and for that the Pacific bank gave its obligations, payable at different times, but I think all within a year; now, Weeks' portion as originally arranged was $315,400; when the Pacific bank, through its directors, urged that the discount which I have mentioned should be made, I went and saw Mr. Weeks and his counsel, and it was finally agreed that Weeks should give us a note for $19,701.32, the discount allowed, so that when the settlement was finally made with Mr. Weeks, we took his notes for $334,701.32; the agreement was that we were to take his notes for $335,101.32; in making that up we took Mr. Weeks' note for $250,000, with 500 receiver's certifi-

cates of the Lebanon Springs railroad of $500 each, as collateral—the same certificates now in evidence in this case—and a note for $19,701.32; that would call for another note of $65,400 to make the full amount; in looking at the notes as they are at the bank, it turns out that that note, instead of being for $65,400, is a note for $65,000, and probably in some way, in the many things taking place at the time, the $400 was overlooked accidentally; so that we really hold Weeks' obligations for $400 less than it should have been.

Now, at the time the Pacific Bank failed, on the 17th day of November, 1881, we held as collateral for the amount of indebtedness due us $765,400, being less the $50,000 draft on the Park Bank of New York, bought as before stated; for that amount we held as collateral the following: A note of R. C. Butterfield for $3,000, with $3,000 Old Colony R. R. bonds as collateral; a note of the Hallett & Davis Piano Manufacturing Company, for $15,000, with 100 shares of the Hallett & Davis Manufacturing Company's stock as collateral; a note of Eastham, Hunting & Carter for $10,000; a note of W. W. Carruth, and Carruth & Dearborn for $7,000, with certificates of payments in the Midland Improvement and Construction Company,
603 which was a company engaged in the construction of the Midland railroad in North Carolina, and those certificates, or those receipts, were for payments of subscriptions towards that construction; another note of the same parties for $18,845.90; a note of William Hinds for $30,000 with 900 shares of the Albany & Buffalo R. R. stock as collateral; a note of John S. Day for $35,000 with 950 shares of the same stock as collateral; a note — William S. Carman for $30,000 with 940 shares of the same stock as collateral; then $5,000 of Nantasket Company bonds—that is a land company at Nantasket Beach; a note of Henry Baldwin as treasurer for $20,000, with $30,000 first-mortgage Denver & Western Pacific railroad bonds as collateral; a note of Henry Baldwin, treasurer, for $5,000, with $10,000 of the same bonds as collateral; a note of Micah Dyer, Jr., for $6,406.65; another note of Dyer for $3,000; a note of William J. Best of $20,000, with certificates of stock in the Midland Improvement & Construction Company as being paid on account to the amount of $22,500; R. M. Pulsifer's note for $22,000, 500 shares of St. Louis & San Francisco second preferred stock as collateral; a note of Edwin Reed for $20,000 with 400 shares of American Rapid Telegraph Company as collateral.

Now, on the above, the Central bank collected between the time of the failure of the Pacific National bank and the 2d day of January, the following: The Butterfield note of $3,000; R. M. Pulsifer, on his note, $10,250; Henry Baldwin, treasurer, $25,000; the Hallet & Davis Piano Manufacturing Company, part payment, $1,000 Edwin Reed, $20,000; which, with the interest on those, amounted to $60,597.36; that is, the interest paid by the people who made the papers. All the rest of the collateral was turned back to the Pacific bank at the time of the settlement on January 2d.

Q. Was new collateral given by the Pacific bank in exchange for the collateral returned to them on the 2d day of January?

A. No; the United States examiner, Needham, personally
604 assured us that if this settlement was made with us, with the other settlements that they were able to make and with the hundred per cent. paid in by the stockholders, the Pacific National bank was perfectly solvent, and that the obligations we had taken of the Pacific bank would be good and would be paid.

Q. Will you give me the total par value of the collateral surrendered by you to the Pacific bank on the 2d day of January, 1882, under this settlement?

A. If my footing is correct, the total par value of the notes returned was $191,502.55, and the collateral I have previously given as belonging to the same.

Q. And all the security that you received in exchange from either Weeks or the Pacific bank was the $250,000 of receiver's certificates in suit in this action?

A. Yes, sir.

Q. Is it not the fact, Mr. Hyde, that the indebtedness of Mr. Weeks to the Central bank, as shown from the facts you have testified to, was incurred prior to the 2d of January, 1882?

A. It was.

Q. No new consideration passed between the bank and Mr. Weeks on the 2d day of January, 1882, the date that you received those certificates?

A. Unless the surrender of the notes and collateral as stated formed a new consideration.

Q. The notes and collateral were surrendered to the Pacific bank?

A. Surrendered to the Pacific bank.

Q. And not to Mr. Weeks?

A. And not to Mr. Weeks.

Q. Mr. Hyde, you know Mr. Hayes, whose testimony has just been put in evidence?

A. Yes, sir.

Q. Is he familiar with the books and accounts of the Pacific National bank?

A. Mr. Hayes, as I understand, when the bank was opened in March, 1882, went in there as a clerk; when a receiver was appointed he was the only man connected with the bank who
605 has been retained until the present time, and he has been a clerk of the receivers, first of Mr. Price, and now of Mr. Butler, ever since.

Q. Do you think, Mr. Hyde, that there is any more competent person now connected with the receivership or with the affairs of the bank in any way who could be produced as a witness to testify to the accuracy of these accounts?

A. As far as the receiver's office is concerned, Mr. Hayes is undoubtedly better informed than anybody else; whether there are any of the old clerks of the Pacific bank now living and where they are I cannot say.

Q. Do you produce the notice referred to in the testimony of the president of the Central bank calling upon Mr. Weeks to pay his

loan? I refer to the notice under the statute for the sale of pledged property.

A. I do; I produce a certified copy from city hall, where by our laws it is required to be recorded.

Examined by PLAINTIFF'S COUNSEL:

Q. Mr. Hyde, did you attend at Greenbush at the sale of the premises described in the complaint in the suit of Sackett *vs.* Root, and also in the complaint in this action, and were you accompanied by Mr. Charles Marsh, who was also a director of the Central National bank?

A. I did attend the sale with the late Mr. Charles Marsh, then a director of the Central National bank.

Q. And were you and Mr. Marsh prepared with funds to bid off the premises and make the necessary cash payments?

A. We were prepared with the funds, and to bid off the road at the price which was understood to be the necessary price, being $155,000.

Q. And would you or Mr. Marsh have purchased it at the referee's (McClellan) sale if it had not been for the bid of Mr. Foster, which made it unnecessary in your opinion to do so in order to protect the interests of the bank?

A. We should.

Re-examined by Mr. FOWLER:

606 Q. Had you any intimation of there being any minimum price other than that described in the terms of sale?

A. As I understand, the lowest bid that would have been received was $155,000, which had been fixed by the court.

Q. Now, I will trouble you, if you please, just to answer the question: Had you any other intimation of there being any minimum price other than that described in the terms of sale?

A. I don't remember whether the terms of sale did or did not fix a minimum price, but I knew that it required $155,000 to pay the expenses, the allowances, what was due the receiver, and the interest then due on the receiver's certificates outstanding, as a round sum; I do not mean to an exact dollar and cent.

Q. Are you not aware of the fact that all the terms of sale were embodied in a written contract signed by the individual defendants in this action, and that there was no other limitation or condition affixed to the sale than those embodied in the terms of sale so signed?

A. There were printed terms of sale which were signed by the purchaser; it is a long time since I have looked at a copy and I cannot say positively as to what was covered as a minimum price that must be paid.

Re-examined by Mr. HALE:

Q. Was there in fact a statement made by Receiver Reynolds showing that the amount of $155,000, in round numbers, was neces-

sary in order to make the cash payments which were to be made, as you have said?

A. There was $155,000 required, and it had been figured up both by the purchasers and ourselves as being the amount which would be required by the court to pay costs, expenses, allowances, counsel, receiver and others, and the interest due on the certificates outstanding.

Q. Was there more than one bid at the sale?

A. As I recollect, there was but one bid.

Q. That was by whom?

A. It was made by Delos McCurdy, Esq., of New York, as attorney for William Foster, Jr., trustee.

607 Re-examined by Mr. FOWLER:

Q. Had you any intimation of any decision by the court in reference to the terms or conditions of the sale of the railway in question other than those embraced in the judgment-roll in evidence in this action?

A. I think the judgment-roll covers all that I have spoken of as being included in the $155,000, and I am aware of no other decision of the court.

Mr. Paige read for Mr. Hale from "examined by plaintiff's counsel" to "examined by Mr. Fowler," down to "examined by Mr. Hale," which he reads for Mr. Hale, and continued reading to the ten drafts.

Mr. Paige offered in evidence the drafts as follows:

$20,000. BOSTON, *Nov.* 16, 1881.

The Pacific National Bank

Pay to the order of J. S. Day twenty thousand dollars.
To the Eliot National bank, Boston.
No. 24359. J. M. PETTINGILL, *Cashier.*

Endorsed.

Wa-ving demand and notice.

JOHN S. DAY.

Waiving demand and notice.

T. C. WEEKS.

Check for $60,000, dated Nov. 16, 1881, in the same form, and endorsed by the same parties.

Check for $50,000, dated Nov. 17th, 1881, in same form, and endorsed by the same parties.

Check for $40,000, of same date, in same form, and endorsed by the same parties.

Check for $40,000, of same date, in same form, and endorsed by the same parties.

Check for $10,000, of same date, in same form, and endorsed by the same parties.

308 Check for $40,000, of same date, in same form, and endorsed by the same parties.

Check for $250,000, of same date, in same form, and endorsed by the same parties.

Check of the Pacific National bank for $3,400, dated Nov. 17, 1881, to the order of Central N. b'k. To the Eliot National bank, Boston. Not endorsed.)

Check for $2,000, of same date, in same form. (Not endorsed.)

Mr. Paige read the testimony of Moses W. Richardson.

MOSES W. RICHARDSON, a witness for the complainant, recalled by Mr. Fowler for further cross-examination:

Q. On your prior examination, Mr. Richardson, I asked you to produce certain papers specified in the examination itself. Do you now produce the papers?

A. I do not now produce them, but will do so.

Q. Prior to the second day of January, 1882, had your bank, the Central National Bank of Boston, had any business transactions with Theodore C. Weeks?

A. They had.

Q. Are you able to state whether on the second day of January, 1882, Mr. Weeks was a debtor to your bank?

A. He was.

Q. Can you state the amount of his indebtedness to the bank?

A. I cannot state it accurately simply from memory, but the statement to which you have referred gives the exact amount—that is, the statement which I propose to and will produce.

Q. Had you any security for any portion of that indebtedness?

A. We had.

Q. How much prior to the second day of January, 1882, if you remember?

A. The account will show that, sir.

309 Q. Are you able to state from your recollection how large a portion of the indebtedness was covered by collateral security, if not a small portion of the indebtedness, prior to the second of January, 1882?

Q. On your prior examination you were not able to State the Christian name of Mr. Weeks; do you refer to Mr. Theodore C. Weeks of this city?

A. I do; yes, sir; I could not just at that moment think of the initials.

Q. And did you then refer to the same person?

A. I did, sir.

Q. You believe him to be the same person who has given evidence in this case?

A. Certainly.

(Signed) MOSES W. RICHARDSON.

Sworn to — subscribed before me this 15th day of November, A. D. 1886.

(Signed) CHAS. F. WALCOTT,
Special Examiner.

Also that of Theodore C. Weeks, continued, at page 30; also for Mr. Hale, the cross-examination.

Examination of Mr. THEODORE C. WEEKS resumed:

Mr. WEEKS: I stated yesterday that I paid Mr. Van Valkenburgh in bank drafts. I remembered distinctly last night, after recalling my recollection to it, that I went over to the Exchange bank, as I said I did, and engaged a loan, and then I went to Mr. Benyon—it was very seldom I went into the bank—and said to Mr. Benyon, which I am sure can be proven if you can get the checks from the Pacific bank, "Can you give me a Pacific bank draft on New York for $25,000, and the balance in certificates of deposit of the Pacific National bank, simply to the credit of John W. Van Valkenburgh?" I suppose you can find that exactly from the bank; you probably have got all of those checks; I gave them $100,000 in New York funds from the Exchange bank.

Q. That is, you took from Benyon $75,000 in certificates of deposits?

610 A. Of his certificates of deposit, if I remember correctly, and for the balance, $25,000, a New York draft.

Q. Then you mean to modify your statement, Mr. Weeks, that you paid to Mr. Van Valkenburgh $100,000 in New York funds?

A. Yes; that is all.

Q. And to state that you paid to him in New York funds $25,000 and $75,000 in certificates of deposit?

A. Yes, sir.

Q. In addition to the credit of $155,000?

A. Yes, sir; that is the way; I state it entirely from recollection, but I believe it is true; it can be verified by your getting those checks from the Pacific, if you wish to.

Q. You have stated before that Mr. Van Valkenburgh said that he understood Mr. Crane had made some sort of arrangement with you, that you should buy six hundred of the Lebanon Springs railroad receiver's certificates, par value $300,000; is it a fact that you ever did buy those certificates?

A. I have stated it so several times; I did buy them, as I have heretofore stated.

Q. From whom did you buy them?

A. I bought them of Edward Crane.

Q. How did it come about, then, that you paid, or claimed to have paid, Mr. Van Valkenburgh?

A. Because he was the party who delivered them; I generally pay for stocks to those who bring them in to me.

Q. Had you any order in writing from Mr. Crane to pay Mr. Van Valkenburgh?

A. I don't remember.

Q. Will you examine and see if you have any such order?

A. I cannot find in my files any order from Mr. Crane.

Q. Are you, then, able to state that there was no such order?

A. I believe if we had had an order of that kind it would have been preserved, and I have no recollection about any written order.

Q. Where did the purchase to which you have referred take place?

A. To the best of my recollection in room 68, Parker house.

611 Q. About what time?

A. A few days previous to the 10th of May.

Q. Who was present?

A. I don't remember anybody but Mr. Crane and myself.

Q. Were the terms of sale and the contract of sale in writing?

A. No, sir.

Q. Then state, as near as you can remember, what was said on that occasion by you and by Mr. Crane.

A. It would be impossible for me to state the conversation; the gist of it was that I agreed to pay 85 for these certificates; I bought them of him, bargained with him then and there for them at 85.

Q. Was anything said in relation to the delivery of the certificates?

A. I do not remember at this moment.

Q. Were the certificates delivered to you at that time?

A. No, sir; I have stated they were delivered to me on the morning of the 10th of May.

Q. And was there no understanding about the time when they should be delivered to you?

A. Undoubtedly, when the bargain was made there was something said; undoubtedly there was some arrangement made for the delivery of them.

Q. State what it was.

A. I say I do not remember; I bargained for them a few days previous to the 10th day of May, at room 68, Parker house, if my memory serves me correctly.

Q. Will it make any difference in your testimony in this respect, if you knew that the receiver, Van Valkenburgh, had already sworn that he never sold those certificates to anybody?

A. It would not make any difference with the statements I have made, sir.

Q. Would it make any difference in your evidence in this respect if you knew that Edward Crane had already sworn that he had never sold the certificates to anybody?

A. It would not make any difference to me, sir; if all the earth said I did not buy those certificates; I bought them of Edward Crane as I have stated.

612 Q. Do you know Mr. W. C. Van Alstyne?

A. I do not recall him by that name.

Q. Would it make any difference in your evidence, that you had purchased these certificates of Edward Crane, if you knew that W. C. Van Alstyne had already sworn that in a conversation with you in Boston you promised to give up these certificates at any time, and stated that you had not purchased them, or words to that effect?

A. Not the slightest; it would not change my evidence a hair.

Q. At the time you claim to have made this purchase, was any-

thing stated by Mr. Crane to the effect that he held the receiver's certificates only as a broker and for negotiation?

A. I think the answer to that is this: My impression is that I supposed he was selling this for and on account of this John W. Van Valkenburgh; that he was in some way interested in the Lebanon Springs road, in what way I do not know that I remember anything about; but as my recollection serves me now, I suppose that he was placing these certificates, disposing of them, for and on account of this man Van Valkenburgh.

Q. (Question repeated.)

A. I can simply say that I believed that he was negotiating them; I don't know that he said he held them as a broker, or anything of the kind; I can say I believed he was negotiating them; I cannot recall the conversation, but I have that impression.

Q. Had you that impression that you now testify to at the time you claim to have purchased these certificates?

A. I say that is my memory now of the impression that was on my mind at the time.

Q. Did you ever see the order of the court authorizing the issue or the issuance of these certificates?

A. I do not think I ever did, sir.

Q. On the 10th day of May, 1881, the day you claim to have consummated the purchase, had you ever seen any order authorizing these certificates to be issued by the receiver?

A. I do not remember of ever having seen any order; the only thing I ever saw published was I remember seeing an ad-
613 vertisement, some kind of a legal notice, or something of the sort, in some New York paper, in reference either to the authority to issue, or the fact that they had been issued, or something of that kind; or else it was, perhaps, a notice asking for authority; my attention was called to that because I believe I had some of the first issue as collateral.

Q. Did you make any personal inquiry in relation to the terms upon which the receiver was authorized to issue these certificates?

A. I do not think I ever inquired into it in the slightest—in reference to the authority on which they were issued.

Q. As you have modified materially your prior evidence in relation to the manner of payment to Mr. Van Valkenburgh for these certificates, will you be kind enough to state again the exact mode in which you claim to have paid Mr. Van Valkenburgh for the certificates he delivered to you on the 10th day of May, 1881?

A. I said in my previous evidence that I gave him $100,000 in bank drafts on New York; I have modified my evidence by stating I thought only $25,000 was on New York, and the rest were bank checks, or whatever you might call them, bank credits; I also caused the Pacific National bank to place to the credit of Van Valkenburgh $155,000, on account of a loan made to me the same day for the same amount on demand, as against $160,000 Lebanon Springs receiver's certificates.

Q. What security did you give the Pacific bank for the $75,000 additional, certificates of deposit?

A. I gave the Exchange National bank's draft on New York for $100,000; I am sure it was their draft on New York; at any rate it was $100,000 of credit, certificate of deposit or draft drawn on their correspondent bank in New York for $100,000, for which I received $75,000 in certificates of deposit to the order of John W. Van Valkenburgh, and a draft on New York, I think drawn by the Pacific on the Continental, for $25,000; that is my recollection.

614 Q. Please refer to your books and refresh your recollection, and state in detail upon what banks in New York the drafts of the Boston banks were drawn, and what Boston banks drew the drafts for the $100,000.

A. I have told you; the Exchange National Bank of Boston drew its draft for $100,000.

Q. On what bank in the city of New York?

A. That I could not tell; it would be impossible.

Q. Was it in one draft?

A. One draft.

Q. Then I understand you to say you took this $100,000 draft of the Exchange National Bank of Boston to the Pacific National Bank of Boston, and exchanged that sight draft for certificates of deposit to the amount of $75,000, and for one sight draft for $25,000?

A. They were not sight drafts; they were merely drafts or checks on the bank in New York; what we call drafts; strictly speaking they are checks, which our banks here draw; they are not drafts, although we call them drafts.

Q. Did you make any arrangement with the Pacific National bank as to the terms of the credit for $155,000?

A. I did.

Q. What were the terms of the credit?

A. The terms of the credit were I was to pay them so much interest on the loan, and retire the loan just as fast as Mr. John W. Van Valkenburgh drew his checks on the bank for the amount placed to his credit.

Q. Were you ever called upon by the Pacific National Bank of Boston to make good any part of this $155,000 to pay the loan?

A. Yes, sir.

Q. How was the notice given to you?

A. I could not tell you that; I presume they sent a boy in and said, "We want you to come in and pay so much of that loan;" that is very likely the way I got the notice; it is pretty difficult to tell how I got it.

Q. Then in point of fact the loan of $155,000 was made to you?

A. They loaned me $155,000 which I had placed to the credit of Mr. Van Valkenburgh, and he took their bank book, a credit of deposit, and that credit was made by this loan to me; the un-

615 derstanding was that as fast as Mr. Van Valkenburgh drew against the $155,000, I was to take up the loan; and I did so as fast as I was called upon to pay it.

Q. You say that the Pacific bank gave Mr. Van Valkenburgh a bank book containing a credit of $155,000?

A. I so understood it, or gave it to me to give to him.

Q. Would it make any difference in your testimony in this respect if you knew that no book of the Pacific National bank shows any account whatever with John W. Van Valkenburgh, or John W. Van Valkenburgh as receiver?

A. Not the slightest.

Q. Was not the $75,000 also entered upon the bank book of Mr. Van Valkenburgh, which you have referred to?

A. I do not think so; I do not think it had anything to do with it; I do not see how it could possibly have anything to do with the $155,000 transaction.

Q. How did you come to make this exchange of the $100,000 draft on New York, for the $75,000 in certificates of deposit and the $25,000 draft of the Pacific National bank?

A. I did that, sir, as my memory serves me, for the purpose of securing the credit for the $155,000, there was a little inducement there, you see.

Q. An inducement to whom?

A. An inducement to the Pacific bank; I remember it distinctly, because it was so seldom I ever went into that bank that I made that transaction myself; and I have no doubt that that influenced me, as well as the fact that I wished to turn over to Mr. Van Valkenburgh about what funds he wanted his payment in.

Q. Did you not about that time have extensive business relations with the Pacific National bank?

A. How so, sir?

Q. In other matters?

A. In respect to borrowing credit?

Q. In any respect?

A. I had a great many transactions with them previous to this.

616 Q. You stated on yesterday that your books of account showed the transactions you had with the receiver's certificates?

A. Undoubtedly they do.

Q. Will you kindly now produce these books?

A. I will.

Ledger and cash book produced.

Q. Point out, if you please, the first entry upon your books relating to these certificates?

A. My books show, first, May 10th, that I paid, the entry upon my cash book shows May 10th, Lebanon Springs Railroad receiver's certificates, this is payment of cash, bought of Edward Crane, and received of J. W. Van Valkenburgh, 300,000 certificates at 85, dated April 2d, to run five years, at 6 per cent., in $500 certificates, Nos. 33 to 632, inclusive; the cash book shows further that $255,000 was the amount to the credit of cash as against that transaction.

Q. What appears to be the next entry upon your books in regard to these certificates?

A. The next entry is a credit to the amount received from 300 coupons, $4,452, June 30th; my next entry is the sale of 15,000 sold

for $13,000, leaving me on hand January 2d, 1882, the account is brought down, 285,000 of Lebanon Springs certificates against $242,250.

Q. What is the next entry?

A. The next entry is a credit to the account of 40,000, par value of the Lebanon Springs Railroad certificates, against $34,020, charged to the account of Edward Crane, and credited to the account of Lebanon Springs certificates.

Q. Was that entry made at the time?

A. Undoubtedly.

Q. State, if you please, what transaction it represents?

A. It represents 40,000 Lebanon Springs certificates sold to Edward Crane, delivered to him by draft on New York, October 21st, 1881, $21,000, against 30,000 of Lebanon Springs receiver's certificates, and October 24th, $7,000 against 10,000 of the certificates; October 21st I drew on Mr. Crane for $21,000 against 30,000 of Lebanon Springs receiver's certificates, and October 24th for $7,000 against 10,000, and the drafts were evidently paid.

617

Q. Read, if you please, the next entry in regard to these certificates that appears upon your books?

A. The next entry is a credit of 235 coupons, January 3d, 1882, $8,550.

Q. What does that entry represent?

A. The collection of the coupons due on the receiver's certificates.

Q. Now read, if you please, the next entry?

A. The next entry is January 11th; the account is debited $21,250 against 25,000 par value Lebanon Springs receiver's certificates.

Q. What does that entry represent?

A. It represents the purchase of 25,000 at 85.

Q. Can you tell by whom?

A. By myself.

Q. From whom?

A. It is entered here "Purchased of John S. Day."

Q. Who was John S. Day?

A. John S. Day was associated with me in business; he got them of John W. Van Valkenburgh.

Q. Was not John S. Day your clerk at that time?

A. Yes, sir; the entry is made to John S. Day; I don't know why, nor what it was.

Q. Read the next entry?

A. The next entry is a credit, August 30th, six coupons, $90.

Q. And what is the next entry?

A. The next entry is a credit of $15,534, against 18,000 par value Lebanon Springs receiver's certificates sold to Edward Crane.

Q. In other words, you sold them to Edward Crane?

A. Yes, sir; that represents a sale to Edward Crane; I delivered them up at Springfield to some insurance company; the next entry is ten coupons; the last entry is Dec. 31st, 1884, Central National bank debtor to Lebanon Springs receiver's certificate account, 250,000

receiver's certificates, in full note due July 2d and 5th, 1882, and interest, $250,000.

618 Q. Will you please make a transcript of that account and attach it to this deposition as part of your deposition?

A. I will.

The witness makes a transcript, produces it, and it is read in evidence.

(Copy.)

Transcript of Ledger Accounts.

Lebanon Springs R. R. receiver's cert'f's.

DR.

1881, May 10	Cash, 300,000 ctfs	255,000	00
1882, Jan. 11	J. S. Day, 25,000 ctfs	21,250	00
1883, Jan. 11	Broadway bank	23	05
June 22	E. Crane	234	00
	325,000 ctfs	276,507	05

CR.

1881, June 30	Cash, 300 coupons	4,452	00
Dec. 31	Pacific bank, 15,040 ctfs	13,000	00
1882, Jan. 4	Edw. Crane, 40,000 ctfs	34,030	00
" 3	Cash, 285 coupons	8,550	00
Aug. 30	Cash, 6 coupons	90	00
Sep. 30	Edw. Crane, 18,000 ctfs	15,534	00
Nov. 2	C. Willis, 10 coupons	150	00
1884, Dec. 31	Cen. Nat. b'k, 250,000 ctfs	250,000	00
	323,000 ctfs	325,796	00

Q. On the 2d day of January, 1882, were you a debtor to the Central National bank in a considerable amount?

A. I was.

Q. Can you state how much?

A. I should think in round numbers about $900,000 or $1,000,000.

Q. Were you an endorser of any of the paper issued by the Pacific National bank?

A. I was.

619 Q. Do you know who held the paper you had endorsed for the Pacific National bank?

A. I presume I do.

Q. Was the plaintiff in this action a holder of any portion of that endorsed paper?

A. I think they were.

Q. Do you recollect about how much?

A. About $700,000 and odd, as near as I can remember; I can give you the exact amount.

Q. Was any settlement made by you with the Central National bank on the 2d day of January, 1882?

A. There was one agreed upon which was consummated later, that being the date of the settlement.

Q. Was the agreement of settlement in writing?

A. I think so.

Q. Will you produce it?

A. I find upon examination I have not the agreement nor a copy of it.

Q. May it not have been the case that that agreement was not in writing?

A. I do not think so.

Q. Is there any entry on your books representing a delivery by you of 500 of these certificates to the Central National Bank of Boston, on or about the 2d day of January, 1882?

A. Undoubtedly.

Q. Will you please turn to your books and find that entry?

A. (Referring to book.) Original entry, Central National bank, debtor to bills payable to my note January 2d, 1882, six months, with interest at six per cent., with 250,000 Lebanon Springs receiver's certificates attached as collateral.

Q. By 250,000 you mean $250,000 par value?

A. Yes, sir.

Q. Is that all?

A. As pertaining to these certificates.

Q. Was the note of January 2d, 1882, now referred to, ever paid?

A. It was not, except through process of foreclosure.

Q. Was that note ever renewed?

A. It never was.

Q. Do you hold that note now?

A. I do not know.

620 Cross-examined by Mr. HALE, for complainant:

Q. Does your book show an entry January 2d, 1882, of another note given to the Central National bank, and if so for what amount?

A. I gave my note in the same entry, dated January 2d, 1882, at 12 months, with interest at 5 per cent., for $65,000.

Q. You testified that for the Exchange Bank draft of $100,000, the Pacific bank gave its certificates of deposit for $75,000, and a draft on New York for $25,000; may not the payment in New York funds of $25,000 have been made in two drafts instead of one?

A. It may have been, but it was impressed on my mind that it was one draft; at any rate, the amount was $25,000.

Q. You are sure the amount was $25,000?

A. Yes, sir.

Adjourned to Monday, November 15th, at 11 a. m.

(Signed) THEODORE C. WEEKS.

Sworn to and subscribed before me this 15th day of November, 1886.

(Signed) CHAS. F. WALCOTT,
Special Examiner.

Also the testimony of Henry D. Hyde resumed.

MONDAY, *Nov. 15th*, 1886.

Examination of Mr. HYDE was resumed by Mr. Fowler:

Q. In the enumeration of checks held by The Central Bank of Boston, plaintiff, on the 2d day of January, 1882, and surrendered on that date to the Pacific bank, one check seems to have been omitted, a check to the order of John S. Day; do you now produce that check?

A. I do.

Q. Who was John S. Day?

A. John S. Day was a clerk of T. C. Weeks; this check of $50,000 dated November 17, 1881, drawn by the cashier of the Pacific
621 bank on the National Park Bank of New York, was purchased by the Central bank for cash, upon the failure of the Pacific bank; the representation being that the money was in the Park bank in New York, and to prevent its being attached, the Central bank was requested to buy the check or draft, which it did; there turned out to be no funds there to pay it, and it therefore was added to the other debt of the Pacific bank to the Central bank.

Q. The representation and purchase which you have just referred to was prior to the 2d day of January, 1882?

A. Yes, sir; the representation and purchase was on the day that the check bears date.

(Check read in evidence.)

BOSTON, *Nov.* 17, 1881.

The Pacific National Bank of Boston

Pay to the order of John S. Day, fifty thousand dollars.

No. 4319. J. M. PETTINGILL, *Cashier.*

Endorsed: John S. Day.

Q. There was some evidence or intimation upon the part of Mr. Weeks that the terms of the settlement between the Pacific bank and the Central bank and himself were embodied in writing, signed by the parties. Do you not regard that as an erroneous impression upon his part?

A. As I recollect the matter, the settlement was the result of many conferences between the Pacific bank, Mr. Weeks and the Central bank, or their representatives, and when finally settled and agreed upon, it was carried out as heretofore stated; and that
622 no agreement in writing was made embodying the settlement.

(Signed) HENRY D. HYDE.

Sworn to and subscribed before me this 15th day of November, 1886.

(Signed) CHAS. F. WALCOTT,
Special Examiner.

Also WILLIAM T. HAYES, resumed.

Examination of WILLIAM T. HAYES resumed by Mr. Fowler:

Q. Was there any account kept by the Pacific bank with John W. Van Valkenburgh, receiver of the Lebanon Springs Railroad Company, or John W. Van Valkenburgh, during the year 1882, down to the failure of the bank?

A. Not that I know of.

Q. You find none?

A. No, sir.

Q. Was there any account on the books of the bank in the year 1882 with Mr. Theodore C. Weeks?

A. I could not say as to that; his name does not appear on the ledger balance at all.

Q. And you think there was no account with him?

A. Yes, sir.

Q. Was there any account in the year 1882 kept between the Pacific bank and Edward Crane, and appearing upon the books of the Pacific bank?

A. I have examined and could not find any.

Q. Did the Pacific bank, in the year 1881 or 1882, have any deposits with any other bank, upon which they checked, and which are shown upon the books of the Pacific bank, except so far as they are shown by the certificates of deposit?

A. No, sir.

Q. If the Pacific bank had paid John W. Van Valkenburgh, in the year 1881 or 1882, any other sums than those appearing in the certificates of deposit, would it not appear upon the books of the Pacific bank?

A. Yes, sir.

623 Q. But as a matter of fact you find no entries showing any other payments to John W. Van Valkenburgh, or John W. Van Valkenburgh, receiver, in the year 1881 or 1882, than those which you have already given in evidence?

A. Yes, sir; that is the fact.

(Signed) WM. THOMAS HAYES.

Sworn to and subscribed before me this 15th day of November, A. D. 1886.

(Signed) CHAS. F. WALCOTT,
Special Examiner.

Also "EXHIBIT 19."

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

BOSTON, *August* 5, 1884.

To Theodore C. Weeks, of Winchester, and doing business in Boston, in said Commonwealth:

The Central National Bank of Boston hereby gives you notice that it intends to enforce payment of your note for two hundred

and fifty thousand dollars ($250,000), dated Boston, January 2d, 1882, payable six months after date to the order of said bank, with interest at the rate of six per cent. per annum, which note said bank now holds and owns, and on which note there is this day due, principal and interest, the sum of two hundred and eighty-seven thousand two hundred and fifty-one dollars and one cent ($287,251.01) by sale at public auction at said Boston by Francis Henshaw & Company, on Saturday, the 11th day of October, 1884, at twelve o'clock m., of 500 receiver's certificates of the Lebanon Springs Railroad Company, each of the par value of $500 at the total par value of $250,000, with the accrued and unpaid
624 interest thereon, said certificates having been pledged by you to said bank to secure the payment of said note.

THE CENTRAL NATIONAL BANK OF BOSTON,
[SEAL.] By J. W. DERBY, *Cashier, and Corporate Seal.*

BOSTON, *August 5th*, 1884.

I, the within-named Theodore C. Weeks, hereby acknowledge to have this day received service of the within notice.

T. C. WEEKS.

Witness:
W. A. SARGENT.

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk County. }

BOSTON, *Aug. 5th*, 1884.

I, William A. Sargent, being duly sworn, on oath, depose and say, that I this day served the within notice on said Theodore C. Weeks, by giving him in hand a duly attested copy of the within notice.

WILLIAM A. SARGENT.

Subscribed and sworn to before me—
ELMER P. HOWE,
Justice of the Peace.

AUGUST 5TH, 1884—1 and 41 min. p. m.

Rec'd, ent'd and ex'd per
FREDERICK E. GOODRICH, *City Clerk.*

CITY OF BOSTON, *November 13th*, 1886.

A true copy from records of mortgages. Lib. 441, fol. 16.

Attest: JOHN T. PRIEST,
Ass't City Clerk.

625 Also the testimony of William C. Van Alstyne.

United States Circuit Court, Northern District of New York.

THE CENTRAL NATIONAL BANK OF BOSTON
vs.
ROWLAND N. HAZARD and Another.

ALBANY, *Nov. 30th*, 1886—10 a. m.

Meeting by consent. Proceedings before William Lansing, examiner, at Albany, N. Y.

Mr. Bulkley appears for complainant.

Mr. Fowler for defendant railway company.

WILLIAM C. VAN ALSTYNE, sworn and examined as a witness for defendant railway company by Mr. Fowler, testified:

I reside in Albany, N. Y.; my business in 1881 was, I was connected with Mr. Van Valkenburgh in business here—railroad enterprise; I subsequently became manager under him as receiver of the Lebanon Springs Railroad Company; remained in that capacity during all the time that Mr. Van Valkenburgh was such receiver; I prepared the statements made by Mr. Van Valkenburgh as receiver; the date of the first quarterly report was for the quarter ending December 31st, 1880; he continued to make reports subsequently during the receivership; these were either prepared by me or under my direction.

Q. Did you have charge of the books of account kept by the receiver relating to the Lebanon Springs railroad?

A. Yes, sir.

626 Q. Do you now produce these books?

A. Yes, sir.

Q. Are you more familiar with the books of account of the receivership than the receiver himself?

A. I think I am.

Q. Referring to the $350,000 of receiver's certificates issued by Mr. Van Valkenburgh as receiver, under the order of Judge Westbrook, are you able to state of your own knowledge from what source the proceeds of the first sale of the certificates were derived?

A. The first issue of certificates of the second series was $16,000 face value, for certificates of the first series held by Edward Crane; the first series were sold at ninety cents on the dollar, and were taken up by those of the second series at ninety-one cents on the dollar.

(Question repeated.)

A. From Edward Crane, as I was informed by the receiver upon his return from Boston about May 12th, 1881.

Q. Will you please turn to the receiver's books of original entry and point out the first proceeds after May, 1881?

A. May 11th, 1881, being $25,000 from Edward Crane.

Q. And in the same way, aggregating, if you please, point out any like sums up to August 11th, 1881?

A. One hundred and fifty-five thousand dollars, which amount was placed in the Pacific National Bank of Boston to the credit of the receiver, all of which was checked out by the receiver between the dates mentioned.

Q. Did the receiver keep a bank account with the Pacific Bank of Boston?

A. Yes, sir; I have the check book, I think; if I have I will produce it.

Q. What other sum, subsequent to May 11, did the receiver realize as the proceeds of the certificates of the second issue of $350,000, as shown by the receiver's books of original entry?

A. Between September 15, 1881, and May 13, 1882, from Edward Crane, in various amounts, the sum of $34,500, making a total amount realized by the receiver on the second issue of cer-
627 tificates of $214,500, which sum was the total amount of cash received on account of the issue of 600 certificates to said Edward Crane, 500 of which—$250,000 face value—are in evidence in this suit, as held by the Central National Bank of Boston.

Q. Were all the sums received by the receiver from the Pacific National Bank of Boston drawn out by him upon his check or upon certificates of deposit issued by that bank to him?

A. As to the $155,000, the entire amount was drawn by the receiver by checks upon the Pacific National Bank of Boston; the amount of $25,000 was in two drafts on New York, issued by the said Pacific National bank, one for $6,500 and one for $18,500.

Q. You are aware that the receiver did not sell the second series of certificates or any portion of them to Edward Crane, are you not?

A. My knowledge is derived entirely from the receiver; of my own knowledge I do not know that he did.

Q. How do you mean derived from the receiver?

A. By verbal statements.

Q. Statements made at the time?

A. No, sir; subsequent thereto.

Q. Prior to August 5, 1884?

A. Yes, sir.

Q. At the time you were directed to make the entries in the books of account?

A. Yes, sir.

Q. State what the receiver said to you then.

A. Upon his return from Boston, about May 12, 1881, having been about two or three weeks making efforts to negotiate the certificates, he said that at last he had disposed of them all; he gave me a memorandum of the $16,000 sold to Crane at ninety-one per cent. in exchange for certificates of the first series at par, he also said that he had issued $300,000 of certificates to Edward Crane, for which Crane was to pay ninety cents on the dollar, on account of which there was entered to the credit of receiver's certificates negotiated the amounts as hereinbefore stated; he showed us a memorandum made between himself as receiver and Edward Crane, which memorandum however was not signed by either party.

628 Q. Did the receiver not then state to you that he had not sold the certificates to Edward Crane, but had intrusted them to him for negotiation, or words to that effect?

A. I can't remember his words on that point.

Q. Are you able to state the amount which the receiver, Van Valkenburgh, realized from the certificates in evidence in this action, as shown by the receiver's books of account?

A. The proportion I compute at $194,250.

Q. Do you know Theodore C. Weeks of Boston?

A. I have met him.

Q. Did you meet him in connection with the certificate of the second issue?

A. Not until long after the transaction between Crane and Van Valkenburgh.

W. C. VAN ALSTYNE.

Sworn to and subscribed before me this 30th day of November, 1886.

WILLIAM LANSING, *Examiner.*

WILLIAM C. VAN ALSTYNE, being recalled as a witness for the complainant, testified as follows:

I was acting under the receiver, Reynolds, as manager at the time of the sale under the judgment in the case of Sackett *vs.* Root; William V. Reynolds was appointed as receiver, as successor to John W. Van Valkenburgh, who resigned; the sale was advertised for the 2d of June, 1885, and postponed until the twelfth of June; on the second of June I furnished the attorneys for the Central National bank with the statement now shown me; it was sent in the letter which is also shown me. (Statement and letter received in evidence and marked Exhibits 1 and 2 of this date.) The letter, a copy of which is contained in Exhibit No. 1, was sent to the referee, George McClellan, who made the sale. Statement Exhibit

629 No. 2 was a correct statement of the liabilities of the receivers referred to in the decree in Sackett *vs.* Root, as nearly as they could be estimated.

Cross-examined by Mr. FOWLER:

The $155,000 mentioned in the statement just put in evidence was paid to the referee, as I understand it; it is admitted that this sum was paid to the referee, and that the interest on the receiver's certificate paid to Bulkley was paid out of that sum.

Direct examination:

I have, so far as I know, most of the papers which the late receiver had; I have searched for the original of Exhibit No. 1 of November 30, 1886, among the receiver's papers; I have seen the original of that paper among the receiver's papers in the receiver's office.

W. C. VAN ALSTYNE.

Sworn and subscribed before me this 3d day of January, 1887.
WILLIAM LANSING, *Examiner.*

(EXHIBIT No. 1 OF JANUARY 3.)

LEBANON SPRINGS RAILROAD,
OFFICE OF THE MANAGER, No. 59 NORTH PEARL STREET,
ALBANY, N. Y., *June* 2, 1885.

W. C. Van Alstyne, manager.

Messrs. Hale & Bulkley, Albany, N. Y.

GENTLEMEN: Since giving you the memorandum of this morning, the receiver has handed me three other items to be included in the schedule, and has written the following letter to Mr. George McClellan, referee:

"In accordance with your request, I am hereby permitted
630 to inform you that the floating liabilities of the receiver, as enumerated in the decree of sale, and to be part of the purchase price, amount to the sum of $155,181.88, and that the cash, receivable and on hand, amounts to about $4,000 at this date."

Yours respectfully, WM. V. REYNOLDS, *Receiver.*

I send you herewith a statement of the floating liabilities, classified as per your request.

Yours respectfully, W. C. VAN ALSTYNE, *Manager.*

(EXHIBIT No. 2, JANUARY 3.)

JUNE 2, 1885.

Recapitulation.

1.	Attorneys and others still unpaid, as provided for in the report of referee	$27,299 21
2.	Interest on certificates to June second	64,156 66
3.	Current liabilities of J. W. Van Valkenburgh, late receiver	11,816 04
4.	Interest on J. W. V. V. current bills	1,165 93
5.	Current bills of William V. Reynolds, receiver	18,523 88
6.	Overcharges on freight	1,511 85
7.	Loss and damage claims	152 68
8.	Taxes for 1883 and 1884	2,290 55
9.	Miscellaneous	12,413 52
10.	Receiver's commission	15,851 56
		$155,181 88

It is here noted that all this is objected to by the attorneys for the certificate-holders, and also by the attorneys for Messrs. Foster and Hazard, and the same is admitted under exception.

Also, the testimony of John W. — Valkenburgh, also, for Mr. Hale, the cross-examination.

631 United States Circuit Court, Northern District of New York.

THE CENTRAL NATIONAL BANK OF BOSTON
vs.
ROWLAND N. HAZARD *et al.*

Before William Lansing, examiner.

ALBANY, *Nov. 30th*, 1886.

Mr. Hale appears for complainant, Mr. Fowler appears for defendant railroad company.

JOHN W. VAN VALKENBURGH, sworn for said defendant and examined by Mr. Fowler, testified:

I was the receiver of the Lebanon Springs Railroad Company in the year 1881; I was sworn as a witness in the proceedings before the assembly judiciary committee in the matter of the charges against Hon. T. R. Westbrook, and was interrogated in regard to certain receiver's certificates issued by me.

Q. I understood you then to swear in substance that $300,000 par value of the certificates had been issued by you to Edward Crane, as your broker, to negotiate, prior to May 10th, 1881; did you not so swear?

A. I think I did.

Q. Was the evidence which you then gave in that regard true?

A. Yes, sir.

Q. Did you ever sell to Edward Crane any certificates issued by you as receiver of the Lebanon Springs Railroad Company other than the first issue of $25,000?

A. No, except an amount less than $25,000 which he had in exchange for the like amount of the first issue.

632 Q. About what time did you make an arrangement with Crane to negotiate the certificates of the Lebanon Springs Railroad Company?

A. It was in the month of May, 1881.

Q. What amount of certificates was placed in Mr. Crane's hands by you?

A. About $300,000.

Q. On what arrangement between you and Mr. Crane were these certificates delivered to him by you?

A. Under the arrangement only as my agent and broker; my instructions from Judge Westbrook were not to dispose of the certificates at less than eighty cents.

Q. By instructions do you mean instructions given to you verbally by the judge in the course of conversation?

A. Yes, sir.

Cross-examined by Mr. HALE:

Q. Was there a written memorandum of agreement between you and Edward Crane, with reference to the transaction by which $300,000 par value of certificates were delivered to him or on his order?

A. There was a memorandum between me and Mr. Crane; the memorandum was intended as a collateral, he having the $300,000 of certificates and was taking them over to Boston.

Q. Was the memorandum to which you refer subscribed by yourself and Mr. Crane?

A. Yes, sir.

Q. Where is the original of that memorandum?

A. That I don't know; don't know where I saw it last.

Q. Did you deliver the certificates in question amounting at par value to $300,000 to Mr. Theodore C. Weeks, of Boston?

A. Yes, sir.

Q. Was such delivery made at the request or by the consent of Edward Crane?

A. Yes, it was by an understanding or arrangement with Edward Crane.

Q. Did you, at or about that time of such delivery, receive certificates of deposit of the Pacific National bank amounting
633 to $75,000, which you endorsed and delivered to Edward Crane?

A. I don't think I did; I don't recollect that.

Q. If you did receive, indorse and deliver certificates of deposit amounting to $75,000, as stated in the preceding question, did you receive any money thereon?

Q. Waived and changed as follows: Did you, in that transaction, as receiver or otherwise, receive anything for said certificates except the credit of $155,000 at the Pacific National bank and $25,000 in cash?

A. Yes; I received more money than that for them, but not from the Pacific bank.

Q. How much more, and when?

A. I received the balance of the $300,000—except 30-odd thousand which Crane did not pay me, about $33,000, I mean 300,000 at 90 cents.

Q. Will you be positive that you did not on the 10th or 11th of May, 1881, at Boston, receive $75,000 in certificates of deposit, or drafts of the Pacific National bank, which you then and there indorsed and transferred to Edward Crane?

A. No, sir; I don't think I did; I have no recollection of that kind; that is as positive as I can be. (Paper shown witness.)

Q. Is not that a correct copy of the memorandum signed by yourself and Crane, which you have referred to, and of a receipt given at or about the same time?

A. I think the upper part is the minute of the transaction between myself and Edward Crane, but the receipt I do not recognize. (Marked for identification, "Plaintiff's Exhibit No. 1 of November 30, 1886.")

Q. State whether all the money realized by you from the second issue of certificates, except such as was used in retaining the first issue was expended upon the railroad of which you were the receiver, and in the purchase of rolling stock thereon?

A. Yes; and for bills due from the railroad, except as appears otherwise from Mr. Cadman's report.

634 Redirect by Mr. FOWLER:

Q. Do the books of account kept by you as receiver correctly show the sums received by you for the certificates given to Crane by you to negotiate?

A. Yes, sir.

Q. Was Mr. Van Alstyne in charge of these books at the time they were made, and from day to day?

A. Yes, sir; he was acting as my general manager and keeping all the books and all the accounts.

Q. Has Mr. Van Alstyne even greater knowledge than yourself of the contents of your book of account as receiver?

A. He did have and has better knowledge; he has had the books for the last two years, but I have never seen them.

Q. In making your computation with Crane did you take into consideration certain certificates of the $300,000 issued to him, which Crane returned to you?

A. I did; but of the $300,000, $24,000 was returned to me by Mr. Crane.

Q. Did you credit his account with these certificates returned, at par?

A. No; at 90 per cent.

Q. In making up your account with Crane, upon your own basis, can you state upon what commission you credit Crane with as cash?

A. I credit Crane with a commission of ten per cent.; that was the commission; he was to have them at 90.

Q. Do you concede the regularity of the issue of these certificates?

A. I do; I think they were regularly issued pursuant to the order of the court, and I have never expressed any opinion to the contrary.

JOHN W. VAN VALKENBURGH.

Sworn to and subscribed before me this 30th day of November, 1886.

WILLIAM LANSING, *Examiner.*

The counsel for The Central National Bank of Boston and the other defendants, holders of receiver's certificates, made the
635 same objections to portions of said testimony as above specified, which objections were overruled, and exceptions taken to each ruling.

Messrs. Yard and McCurdy also objected to said testimony upon the ground that it was not binding upon any of the parties to this action. (Objection overruled and said defendants excepted.)

Counsel for plaintiff admitted for the purpose of this trial and for no other purpose, that Mr. Ogilvie, who is now and was then an officer of the defendant, The Union Trust Company, was called as a witness by the plaintiff in the case of Sackett against Root upon the trial and upon subpœna or request of the plaintiff, produced as in

the possession of the said Union Trust Company a check and two letters of William Butler Duncan.

Plaintiffs' counsel also read in evidence a check and two letters of William Butler Duncan from said printed case.

The following is a copy of said check and letters:

"NEW YORK, *January* 23, 1873.

Messrs. Duncan, Sherman & Company pay to the order of Charles S. Fairchild, referee, ninety-nine thousand seven hundred and sixty-eight dollars $\frac{41}{100}$.

$99,768.41. W. B. DUNCAN."

Indorsed.

"Pay to the order of S. T. Fairchild, att'y.
CHARLES S. FAIRCHILD, *Referee.*"

"Pay to the Union Trust Company of New York or order.
S. T. FAIRCHILD, *Attorney.*"

636 "NEW YORK, *January* 24, 1873.

Union Trust Company of New York, trustees of first mortgage upon Lebanon Springs Railroad Company.

DEAR SIR: Tomorrow at Albany, the sale of the above road takes place under foreclosure proceedings and I shall attend the same, and in the event of my purchasing the same, or of its being purchased by one who shall tender to the referee my check for the purchase-money, will you instruct the referee to receive the same? I had a conversation with Mr. Horace F. Clark yesterday and he agreed to this, and also agreed that you would hold said check upon my agreement to honor the same whenever any of the parties protected by the same, viz., the holders of the bonds, should elect to accept their proportion of the result of the sale, and to the extent of such election. I ask this as the result of such sale will in all probability yield so small a dividend upon each bond, that the holders of said bonds and coupons will accept in lieu thereof the proposition we are prepared to make whenever the same is completed. I shall be able to tender the whole amount of the bonds so received by me in exchange for such proposition. I shall be obliged for an immediate answer that I may take the same with me to Albany this p. m. at two o'clock.

Yours truly, W. BUTLER DUNCAN."

The second letter is as follows:

"MY DEAR SIR: I gave Fairchild, referee, my check for $99,768.41, being amount of purchase-money Lebanon Springs railroad, $100,000 less referee's costs, $231.59. If you will, as arranged with Mr. Clark, hold said check, I shall in all probability in a very short time be able to present *to* entire amount of the indebtedness of the

Lebanon Springs railroad, to which this amount is applica-
37 ble. In the meantime should any claimants apply to you, you will please refer them to Mr. Hancock at this office and
blige,

Yours truly, W. BUTLER DUNCAN,
President Union Trust Company, Trustee, etc.

January 27, 1873."

It was admitted that on the twenty-seventh day of July, 1875, ne firm of Duncan, Sherman & Co., suspended payment, and made n assignment for the benefit of their creditors, and then ceased to o business as a firm.

The plaintiffs' counsel then read in evidence from the printed ase the testimony of Lyman B. Bunnell, as follows:

LYMAN B. BUNNELL, sworn on behalf of the Central National ank and the other certificate-holders, and also on behalf of the ew York, Rutland and Montreal railroad, and testified.

Examined by Mr. HALE:

Q. Where do you reside?
A. City of New York.
Q. You are a practicing lawyer?
A. Yes, sir.
Q. Residing in New York city?
A. Yes, sir.
Q. How long have you been in practice there?
A. Since January, 1863.
Q. Were you in the fall of 1880 employed by certain bondholders f the Lebanon Springs railroad to present a claim in the suit of ackett against Root which was then pending?
A. Yes, sir.
Q. Will you give the names of the bondholders by whom you ere employed at that time?

(Mr. Paige objects to the testimony; it does not appear that the itness knew whether they were bondholders or not.)

Q. Give the names of persons by whom you were employed?
38 A. The person who employed me first was John Hurd, who was the owner——

(Objected to.)

Q. Did he produce any bonds to you?
A. I saw the bonds which were admitted to be his and which he aid were his, at the office of John Bloodgood.
Q. Purporting to be Lebanon Springs Railroad bonds?
A. Yes, sir.
Q. How many were there?
A. About $100,000, and John Bloodgood had a much larger num-er than that in his hands; I believe some of them he claimed, or urported to claim, Myron Bloodgood, his brother, had, but they

were all transferred—Hurd's and Myron's to John Bloodgood, so that John Bloodgood's name represents the bonds that the three held.

Q. How many bonds were there in all that you saw in John Bloodgood's possession?

A. I shouldn't like to say now from memory; I think over $350,000.

Q. Who were the others that you appeared for?

A. Mr. Bayliss and Mr. Mills.

Q. Do you remember how many bonds Mr. Bayliss had?

A. No, sir.

Q. Or Mr. Mills?

A. No, sir.

Q. Who else?

A. A man named Wolfe and Mr. Bonner.

Q. Mr. Amos L. Hopkins?

A. Yes, sir.

Q. (Presenting same.) Look at the paper I show you and say whether that was a petition prepared under your direction in your office?

A. Yes; the petition is; there are papers there now that were not there.

Q. The notice of motion?

A. Yes, sir; that is in my handwriting and the petition proper.

Q. The notice of motion, I observe, is for a special term to be held at Kingston on the 27th of November, 1880, in the case of Marvin Sackett against Russell C. Root and others; did you present the petition and notice at the special term at the time referred to?

A. Yes, sir; on the 27th of November.

639 Mr. Hale offered in evidence the petition and notice. Same received and marked "A—S. C. R."

Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

Please to take notice that on the annexed petition I shall move this court, at a special term thereof to be held at the city of Kingston, Ulster county, in the State of New York, at chambers in the court-house, on the 27th day of November, 1880, at 11.15 a. m. of that day, or as soon thereafter as counsel can be heard, for an order directing that the persons named in the said petition as bondholders be made parties to this action either as coplaintiffs or codefendants as they may be advised, and for such other and further order in the premises as may be just and to the court shall seem proper.

New York, November 12, 1880.

Yours, etc.,
L. B. BUNNELL,
Attorney for Petitioner, 170 *Broadway, N. Y.*

To Messrs. McClellan & Brown, plaintiff's attorneys, Chatham village, Columbia Co., N. Y.

640 Supreme Court.

MARVIN SACKETT
against
RUSSELL C. ROOT.

To the supreme court:

The petition of John Bloodgood and others, representing a majority of the bondholders of the Lebanon Springs Railroad Company, and shown on the schedule hereto annexed, respectfully shows to this honorable court:

First. That your petitioners are informed and believe that prior to the — day of July, 1867, the Lebanon Springs Railroad Company was duly incorporated under and pursuant to the laws of the State of New York, and as such had all the rights and franchises of a railroad corporation of, in and to the several pieces and parcels of land constituting the track and road-bed of a railway, starting from Chatham Four Corners, and in the county of Columbia, New York, and extending in a northwesterly direction to the boundary line between the State of New York and the State of Vermont, and from thence to the village of Bennington in said State of Vermont.

Second. Your petitioners further show that thereafter and as such railroad corporation, as they are informed and believe, on or about the first day of July, 1867, it duly issued and sold the bonds of the said company to the amount of $5,000,000 to individuals and to towns along the line of said road and through which the same passed, and to secure the payment of said bonds the said Lebanon Springs Railroad Company on the said day made, executed
641 and delivered to the Union Trust Company of New York a mortgage, whereby the said company conveyed to the said trust company all its property in trust to pay the principal and interest of said bonds.

Third. Your petitioners further show that they are informed and believe that said mortgage was a first mortgage upon the property and franchises of the said Lebanon Springs Railroad Company, and the said bonds for which the said mortgage was given to secure were due and payable thirty years from the date thereof, with interest at seven per cent. per annum, payable semi-annually on the first days of July and January of each year.

Fourth. Your petitioners further show that they are informed and believe that thereafter and about December 31, 1869, and pursuant to the statute of this State, the said Lebanon Springs Railroad Company was consolidated with the Bennington and Rutland Railroad Company, a corporation formed and existing under and pursuant to the laws of the State of Vermont, and the said roads became known as the Harlem Extension Railroad Company, which company assumed the payment of the aforesaid first-mortgage bonds.

Fifth. Your petitioners further show that they are informed and believe that the Union Trust Company of New York foreclosed the said mortgage, and the entire property of both companies was duly

sold at public auction pursuant to an order of foreclosure and sale and conveyed by the referee appointed for that purpose to James C. Hull for the use and benefit of your petitioners.

Sixth. Your petitioners further show that they are informed and believe that at about the same time, by similar proceedings taken in the court of chancery, in the State of Vermont, the franchises
642 and property of the said company were removed and conveyed to Charles G. Lincoln, for the use and benefit of your petitioners.

Seventh. Your petitioners further show that they are informed and believe that on or about the — day of September, 1880, Martin Sackett commenced an action in the supreme court of this State against Russell C. Root, the Harlem Extension Railroad Company and others, praying, among other things, that the interests of the bondholders may be protected, and for that purpose that the property and franchises may be sold by a receiver, to be appointed by this court.

Eighth. Your petitioners further show that they are a majority of the owners and holders of the said $2,000,000 of bonds, and shown on the schedule annexed hereto.

Ninth. That your petitioners are not made parties, plaintiffs or defendants, in said suit, and that their interest- are such as to require that they be made parties, plaintiffs or defendants, herein.

Wherefore, your petitioners pray that they be made parties, plaintiffs or defendants, herein by the order of this court.

And this they will ever pray.

J. G. MILLS.
G. J. BONNER.
JOHN BLOODGOOD.
A. S. HOPKINS.
L. HOF.
A. WAEFF, JR.
AB'M B. BAYLIS.

L. B. BUNNELL,
Att'y for Petitioners, 170 *Broadway, New York City.*

Shall be appointed in the present proceeding, Mr. A. L.
643 Hopkins, of New York. We believe that Mr. Hopkins will, if appointed, from his railroad experience and character, protect the interest of all parties interested.

H. D. GAY,
Railroad Commissioner, Town New Lebanon.
BENJAMIN GATES,
Trustee Shakers.
D. C. BRAINARD.
AMOS STEWART.
DANIEL BOWLER.
GILES B. AVERY,
LEVI DAVID.
PERCIVAL B. FERGUSON.
GEORGE W. CLARK.
CHARLES DONNET.
NELSON PEBBLE.
LOUIS BASTING.
LEVI SHAW.
FREDERICK SIZER.
CALVIN G. REED.
DAVID REAR.
ANDREW BARRETT.
G. W. JONES.
RICHARD FLETCHER.

PATRICK LYNCH.
AVERY ALLEN.
RUFUS AMES.
WILLIAM JUSTICE.
WILLIAM LAWLOR.
MICHAEL MURRAY.
C. B. BOSTOCK, *M. R. Co.*
JOHN MAXWELL.
CONRAD SMITH.
R. GILMAN.
HENRY MANTLE.
R. M. HAGAN.
MOSES CLEMENT.
WILLIAM FRAWLEY.
JAMES BURKE.
G. W. BAGG.
J. K. REYNOLDS.
F. W. EVANS.
DANIEL OFFORD.
JOHN SHEA.
OLIVER PRENTICE.
D. FRASER.
JOHN GREAVES.
W. S. HUNTER.
ZINA L. WILSON.
644 JEREMIAH ROTH.
TIMOTHY RAYSON.
HENRY CANTRELL.
EMIL BRETZNER.
GILES W. AVERY.
LEVI DAVID.
PERCIVAL V. FERGUSON.
PATRICK LYNCH.
AVERY ALLEN.
RUFUS AMES.
WILLIAM JUSTICE.
WILLIAM LAWLOR.
MICHAEL MURRAY.
C. B. BOTSOCK, *M. R. Co.*
JOHN MAXWELL.
CONRAD SMITH.
R. GILMAN.
HENRY MANTLE.
R. M. HAGAN.
MOSES CLEMENT.
WILLIAM FRAWLEY.
JAMES BURKE.
C. W. BAGG.
J. R. REYNOLDS.
F. W. EVANS.
DANIEL OFFORD.

W. L. BARROWS.
A. G. HOLLISTER.
H. T. CLOUGH.
GEORGE M. WICKERSHAM.
ORREN N. HASKINS.
CHARLES SIZER.
ANDREW FORTIER.
RUFUS CROSSMAN.
CLARK HAYDEN.
WILLIAM ANDERSON.
W. C. LANGBRIDGE.
JAMES S. GLASS.
DANIEL CROSMAN.
C. F. GANEBIN.
DAVID GILL.
JOSEPH R. SLINGERLAND.
JOHN BLOODGOOD & CO.
I. G. MILLS.
L. T. HOYT.
A. WOLF, JR.
AB'M B. BAYLIS.
H. D. GAY,
Railroad Commissioner,
Town New Lebanon.
BENJAMIN GATES,
Trustee Shakers.
D. C. BRAINARD.
AMOS STEWART.
DANIEL BOWLER.
HENRY CANTRELL.
EMIL BRETZNER.
GEORGE W. CLARK.
CHARLES DONNET.
NELSON PEBBLE.
LOUIS BASTING.
LEVI SHAW.
FREDERICK SIZER.
CALVIN G. REED.
DAVID REED.
ANDREW BARRETT.
G. W. JONES.
RICHARD FLETCHER.
W. L. BARROWS.
A. G. HOLLISTER.
H. F. CLOUGH.
GEORGE M. WICKENHAM.
ORRIN N. HASKINS.
CHARLES SIZER.
ANDREW FORTIER.
RUFUS CRASMAN.
CLARK HAYDEN.

JOHN SHEA.
OLIVER PRENTISS.
D. FRASER.
JOHN GREAVES.
W. S. HUNTER.
ZINA L. WILSON.
JEREMIAH ROTH.
TIMOTHY RAYSON.
WILLIAM ANDERSON.
A. C. LANGBRIDGE.
JAMES S. GLASS.
DANIEL CRASMAN.
C. F. GANEBIN.
DANIEL GILL.
JOSEPH R. SLINGERLAND.

CITY AND COUNTY OF NEW YORK, *ss* :

L. B. Bunnell, being duly sworn, says that he is the attorney of the petitioners named in the foregoing petition, and that the
645 same is true to his own knowledge except as to the matters therein alleged to be stated on information and belief, and as to those matters he believes it to be true.

That the reason why this petition is verified by deponent and not by petitioner is, because most of them do not reside in the county of deponent, and the names were obtained with great difficulty, and it is impracticable to obtain the verification of each.

L. B. BUNNELL.

Sworn to before me the 11th day of November, 1880.

WM. M. ADLER,
Notary Public, N. Y. Co.

The plaintiff should not be embarrassed by having united with him on the record parties whose case he may not be able to sustain. At the same time these parties who apply should have notice of every step in the cause so that they may protect their interests. An order may be made requiring all papers and motions to be served upon Mr. F. L. Westbrook and allowing him as counsel to appear on trials, hearings and motions.

T. R. W.

December 28, 1880.

Q. The signatures signed on the same page with the petition you identify?

A. Yes, sir.

Q. And also the signatures on the next paper of Wolfe and Bayliss?

A. Yes, sir; the next sheet I recognize except the handwriting above the signature of John Bloodgood; that above I don't recognize; I don't recognize these names, which are repetition.

Q. By that you refer to the two sheets preceding the verification?

A. Yes, sir; I recognize the verification as mine.

646 Q. Now, can you give from recollection a statement of the whole number of bonds which were possessed by these parties?

A. I cannot.

Q. What is your best recollection upon that subject?

(Objected to unless the witness speaks from his own knowledge.)

Q. I speak of your own knowledge?

A. I did not see the bonds of any parties other than those held by Mr. Hopkins and Mr. Bloodgood, who also held Mr. Hurd's.

Q. Those are the ones you have spoken of?

A. Yes, sir; I didn't see the bonds of the other owners, but a list was sent to me which seems to have been taken from that paper (I don't know where this was) showing the number of bonds they had.

Q. You appeared there and presented this petition which says they are the majority of the owners and holders of the said two millions of dollars—at the time you presented this petition, was it on behalf of persons who were bondholders, as you understood it, for that amount?

(Objected to.)

Q. Whether you appeared for persons who claimed to be bondholders and to what amount?

(Objected to as calling for the conclusion of the witness; overruled; plaintiff excepts.)

A. My impression is that they represented all except about $700,000 of the bonds.

Q. You knew Judge Westbrook in his lifetime?

A. Yes sir.

Q. You were familiar with his handwriting?

A. I have seen him write several times.

Q. This indorsement upon the petition, on the back of it, is that in Judge Westbrook's handwriting?

A. Yes, sir; that is, I believe it to be; I have no doubt that it is his.

Q. That indorsement "Draw order as per mem., and submit to me, T. R. W."—is that in Judge Westbrook's handwriting?

A. Yes, sir.

Mr. Hale read the indorsement of Judge Westbrook.

647 Q. Now, you have said that you attended at Kingston?

A. Yes, sir.

Q. And you argued the motion upon the presentation of that petition to Judge Westbrook?

A. Yes, sir.

Q. Who was associated with you upon that argument?

A. F. L. Westbrook.

Q. He was retained by whom?

A. John Bloodgood.

Q. One of the petitioners?

A. Yes, sir.

Q. He appeared with you upon the argument before Judge Westbrook?

A. Yes, sir.

Q. Do you recollect that a petition of William Butler Duncan and Trenor W. Park was presented at the same time by Mr. McCullough?

A. Mr. McCullough was there and presented the interests of Trenor W. Park; I don't think I saw his petition; we went up on the cars together.

Q. He did take part in the argument?

A. Yes, sir; Mr. McCullough was speaking when I left.

Q. You and Mr. Westbrook had gotten through?

A. Yes, sir; I had finished and I desired to take an early train to New York and I left Mr. McCullough there.

Q. Did you afterwards receive this petition back from Judge Westbrook with these indorsements upon it?

A. Yes, sir.

Q. Did you thereupon draw an order in pursuance of this memorandum?

A. Yes, sir.

Q. And sent it to the county clerk of this county to be filed?

A. I sent it first to Judge Westbrook; I have examined my register since I have been subpœnaed here and I find it was on the 5th of January that I received the papers back from Judge Westbrook; no, I sent the order to be signed by Judge Westbrook on the 5th of January, 1881; my register does not show that I received the papers back, but it shows that on the ninth I mailed the papers,
648 petition and all, to the clerk of this county. (The fact is here taken that this petition and notice of motion are marked as filed January 10, 1881.)

Q. Have you looked at the records in the clerk's office to find that original order?

A. I looked through the books in which the papers were kept, in which I found the petition.

Mr. Hale offered in evidence from the clerk's book of minutes of the records of the court a copy of the order which was made upon this application, and read the same.

At a special term of the supreme court of the State of New York, held at the city of Kingston, in the county of Ulster, in the State of New York, on the 10th day of December, 1880.

Present: Hon. T. R. Westbrook, justice.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

A motion having been made herein by certain of the bondholders of the Lebanon Springs Railroad Company, asking to be made parties to this action, either plaintiffs or defendants, and it appearing to the court that the plaintiff's rights might be endangered if they should be united with him as parties plaintiffs and it also appearing that said petitioners should have notice of all the proceeding had in this action after hearing Messrs. F. L. Westbrook and

G. B. Bunnell, of counsel for the petitioners, and Messrs. McClellan, Andrews and Vanderpool, of counsel for the plaintiff, the counsel for the petitioners having withdrawn the application in their
649 behalf except as to I. G. Mills, G. T. Bonner & Co., L. T. Hoyt, John Bloodgood & Co., A. L. Hopkins, Aaron Wolff, Jr., and Amb. B. Baylis, it is, on reading and filing the petition and notice of motion of F. L. Westbrook, of counsel for the petitioners, ordered that the said motion, so far as it asks that the petitioners may be made parties, be and the same is hereby denied.

It is further ordered that the plaintiff's attorneys be and they are hereby required to serve copies of all papers and notices of every kind, which shall be served herein, upon Mr. F. L. Westbrook, of Kingston, Ulster county, New York, and he is hereby authorized and allowed to appear as counsel in behalf of the said bondholders hereinbefore mentioned, upon all trials, hearings and motions herein.

Enter in Rensselaer county.

T. R. WESTBROOK.

Q. Now, you had some correspondence with F. L. Westbrook after this order was made?

A. I don't recollect any.

Q. Did he send papers to you that had been served on him after that?

A. I think he served one or two notices.

Q. That had been served upon him?

A. Yes, sir; I will not be certain, however, that he did not send them direct to Mr. Bloodgood and that Mr. Bloodgood sent them to me.

Q. They came to you anyway in some way?

A. Yes; two or three papers only.

Q. So far as you know there was no appeal taken from that order?

A. No, sir; not that I know of.

Q. Had you any further connection with the case after that?

A. No, sir.

Q. Were the Oliver Charlick bonds among those represented by you?

A. No, sir.

Q. Or the Samuel J. Tilden or Henry A. Tilden, or any other Tilden bonds?

A. No, sir.

650 Q. Mr. Park's bonds?

A. Mr. Park signed the petition once; he afterwards withdrew his name and Mr. McCullough appeared for him independently whatever appearance he did put in.

Q. Do you know Mr. Park's handwriting?

A. No, sir; I do not; it was erased before the paper was used.

By Mr. JENNINGS:

Q. You didn't represent him upon that?

A. No, sir.
Q. Nor Mr. Duncan?
A. No, sir.

By Mr. HALE:

Q. You represented no persons whose names do not appear upon that petition?

A. No, sir; the persons whom I represented were Mr. Mills, Mr. Bonner, Mr. Wolfe, Mr. Bloodgood, Mr. Hopkins, and Mr. Baylis.

Q. The persons who are named in the order as I read it?

A. Yes, sir; I would like to state that the papers came to me with that long list of signatures to it; I supposed they were individual bondholders; Mr. Vanderpoel on the argument said they were only members of the Shaker community, and then it flashed through my mind that that was true, and I stated to Judge Westbrook that I only insisted that those names should appear as one name; I didn't know before that they were members of the Shaker community.

Q. You understand at first that they were individual bondholders?

A. Yes, sir.

Cross-examination by Mr. PAIGE:

Q. You said that your recollection was that the number of bonds represented by the petition was something like $750,000?

A. $750,000 less than two million dollars.

651 Q. What do you mean by your "recollection" in that answer?

A. A list or statement with the names of the bondholders and the number of bonds held by them was furnished me; I don't know why it is not with that petition.

Q. Who furnished it?

A. Mr. Bloodgood furnished for those that he had, and Mr. Hopkins furnished for his, and the other parties I didn't see, but Mr. Bloodgood sent out while I waited at his office and procured the signatures to the petition of the other bondholders with a statement of the bonds which they held.

Q. What you mean when you speak of your recollection is that it is your recollection as to that paper?

A. Yes, sir; the figuring and adding up.

Q. You don't know of your own knowledge whether the signatures were genuine or whether the persons whose signatures were there represented owned any bonds?

A. No, sir; only from what they told me.

Q. If you can, state what papers did Frederick L. Westbrook send to you after the denial of this motion, if any?

A. I don't think he sent any papers unless it was a notice of trial.

Q. Notice of trial?

A. Yes, sir; here at the circuit.

Q. When was that?
A. I wouldn't undertake to fix any date.
Q. About?
A. I should think it was some good many months after the order was entered.
Q. About how many, and what time of the year?
A. My mind is a perfect blank upon the subject, as far as any papers are concerned; I don't think he ever sent over one or two.
Q. Do you know whether Mr. Frederick L. Westbrook afterwards declined to act any further in the matter?

(Mr. Hale objects as incompetent, hearsay, and not the proper mode of proving it.)

652 The COURT: If he knows the fact.
A. He didn't decline to me.
Q. Do you know the fact?

(Objected to.)

The COURT: He may answer if he knows.
(Exception by Mr. Hale.)

Q. Do you know the fact?
A. Mr. Bloodgood told me.

(Mr. Hale objects.)

The WITNESS: I only know what Mr. Bloodgood told me.
Q. You have now told everything which was done by Mr. Westbrook or by yourself in connection with the case of Sackett against Root, after the making of the order which Mr. Hale read from the book, as you remember?
A. Yes, sir; I did nothing in the case after that order was entered.
Q. You have told everything, so far as you know, that Mr. F. L. Westbrook did?
A. Yes, sir; all that I recollect I have told.

Mr. HALE:

Q. Of course, you don't know what papers were served on Mr. Westbrook after that?
A. No, sir.
Q. You don't know what he may have done in pursuance of the papers served on him?
A. No, sir; I don't.
Q. You were examined on this subject before a committee of the Legislature in 1882?
A. Yes, sir.
Q. In what is known as the Ward-Westbrook investigation?
A. Yes, sir.
Q. Do you know the fact that these bonds were afterwards sold, or many of them, to Edward Crane—bonds that you represented—or do you know that only from what Mr. Bloodgood told you?

A. Yes, from what he told me, and from what Mr. Hurd told me; I only know from what I was told; I had nothing to do with it.

By Mr. JENNINGS:

653 Q. You don't mean to be understood as saying that Mr. McCullough was in any way associated with you in representing those bonds?

A. No, sir; he appeared independently.

By Mr. PAIGE:

Q. Do you know what became of Mr. McCullough's application?

A. No, sir; I don't know; the memorandum of Judge Westbrook is all I know was done that day; the papers were never filed with the clerk.

Q. Do you recollect what the memorandum was?

A. There was no memorandum made of Mr. McCullough's application that I know of.

Counsel for the Central National bank and the other certificate-holders made the same objections to portions of said testimony as appear above. Said objections were overruled and the evidence received and said counsel duly excepted.

Plaintiffs' counsel also offered in evidence the testimony of Delos McCurdy from said printed case as follows:

DELOS MCCURDY, sworn on behalf of the parties represented by Mr. Fowler and Mr. Hale, and testified as follows:

Examined by Mr. HALE:

Q. You are an attorney and counselor at law?

A. Yes, sir.

Q. Are you a member of the firm of Vanderpoel, Brown & Cumming, or connected with that firm?

A. Vanderpoel, Cumming & Goodwin; it used to be Vanderpoel, Green & Cumming.

Q. Your firm are now attorneys for some of the defendants in this action?

A. Yes, sir.

Q. Were you counsel for the plaintiff in the case of Marvin Sackett against Russell C. Root, and others?

A. Yes, Mr. Vanderpoel and myself both; Mr. Vanderpoel first and then subsequently I acted.

654 Q. From the beginning to the end of the action?

A. Yes; from the beginning down to the present time.

Q. You consulted with the attorneys and were in consultation with the attorneys McClellan and Brown who brought the suit?

A. Yes, sir.

Q. Was the original complaint drawn by you?

A. I think Mr. Vanderpoel and Judge McClellan got that original one up.

Q. Whom did you represent in bringing that suit?

(Mr. Paige objects.)

Q. Or during its pendency?

(Mr. Paige objects; he may state the facts that occurred.)

The COURT: I think he may state about it.

A. First Samuel J. Tilden; the executors of Oliver Charlick, those executors were Mr. Aaron J. Vanderpoel and George W. Quintard; Mr. Blood; Mr. Delancey, Augustus Schell, I think Henry A. Tilden, and the estate of Moses Y. Tilden; I think those were all at first.

(Mr. Paige also objects that it is immaterial, raising an issue against persons who are not parties to this suit and cannot have their day in court. Objection overruled. Mr. Paige excepts.)

Q. Will you state whether they were bonds of the Lebanon Springs railroad and to what amount?

(Objected to.)

A. I do know that, for I have the bonds now, I think; Samuel J. Tilden had 150, I think, $1,000 each; there was $150,000 face value; estate of Oliver Charlick, 50; Mr. Blood, 10; Mr. Delancey, 25; Augustus Schell, 75; there were more but I can't tell you how many that had belonged to Horace F. Clarke or in which he had some interest which were represented, Mr. Schell said, by him; I have forgotten the exact number; then subsequently Henry A. Tilden and myself undertook to get representation of the
655 entire bondholders; it was found that it was impossible to get a representation of the bonds in this Sackett suit that were held by the town, owing, if I recollect right, to the same difficulty that has been explained here, that the town could not sell the bonds or do anything with them for less than par; Mr. Edward Crane, in connection with Henry A. Tilden, undertook to acquire those bonds and did acquire bonds to the amount of about $450,000, as I recollect; I think that was the number; those bonds also were represented by me upon being acquired by Mr. Crane.

Q. About what time was it they were acquired by Mr. Crane?

A. My present recollection would be it was in 1881 and 1882, that he was acquiring these bonds during part of 1880 and 1881 and 1882; it took some time to get them; we also represented a number of others, holders of bonds, whose names I can't recall; some lived out of town, and the only communication I had with them was by letter; I remember one was at Port Jervis, the cashier of the bank there; I looked for the letters and I don't find them now; I had a complete list of the bondholders whom I actually represented which I think I gave to Mr. Henry A. Tilden and Mr. Hamilton Harris on one occasion, and I think since that time I have not seen the list; I have looked for it; the entire amount of the bonds which we represented as we figured it up——

(Objected to.)

The WITNESS: We figured them up by putting down the list of the names and the number of bonds they held.

(This testimony is objected to.)

The COURT: He may state how many bonds they represented in the aggregate, if he knows.

(Mr. Paige excepts.)

The WITNESS: It was about twelve hundred thousand dollars face value all told.

Q. Did that include the bonds of Trenor W. Park?

A. No, sir.

656 Q. Or include the bonds of the gentlemen represented by Mr. Bunnell?

A. If you will permit me to say what I have learned; I have understood that Mr. Crane acquired the bonds of Mr. Bloodgood and others.

Q. So it may have included some of them?

A. Yes, sir.

Q. Did you know the number that Mr. Crane acquired from the town?

A. I did know, but I couldn't undertake to tell now and distinguish the town; we had a complete list, as I told you; I did know exactly where all the bonds were.

Q. You speak of receiving letters from different bondholders; did you communicate with bondholders as to the pendency of the suit?

A. Yes, sir.

Q. And with all of them so far as you could ascertain?

A. Yes, all of them as far as I could ascertain with the exception of Mr. Park; he knew about it I think.

(Mr. Jennings asks that the last clause be stricken out, to which Mr. Hale consents.)

Q. Can you tell how many bondholders you found—I mean what amount you found and communicated with?

(Mr. Paige objects.)

The COURT: I will allow him to say whether he can tell or not.

A. I think I can partially, pretty near.

Q. State the amount.

(Mr. Paige objects; overruled; exception.)

A. About $1,500,000 or $1,600,000.

(Mr. HYDE:)

Q. Other than what Mr. Park held?

A. Yes, sir.

Q. You were present at the trial before Judge Westbrook of Sackett against Root?

A. Yes, sir.

Q. Partly tried here and partly at chambers in Kingston?

A. Yes, partly here and partly at his chambers in Kingston; adjourned from here there.

By Mr. LAROCQUE:

657 Q. I understood you to say you communicated with all the bondholders you knew of except Mr. Park; did you act in any way for Mr. Duncan?

A. I meant to include Mr. Duncan with Mr. Park.

Q. You didn't represent him or communicate with him?

A. I didn't represent him, but I had communication with him, but not in the same line that I did with the others.

By Mr. HYDE:

Q. Did you have any communication with him in regard to the suit when it was pending in any way?

A. I can't tell you; there were three or four suits, I think, against Park and Duncan and I don't remember that I communicated particularly with him about this one.

By Mr. HALE:

Q. Have you any knowledge as to Mr. Crane acquiring any of the other bonds represented by Mr. Bunnell except Mr. Bloodgood's?

A. No, sir.

By Mr. PAIGE:

Q. What became of Crane's bonds, the $450,000 you have mentioned?

A. I will tell you as far as I know; within the last two years, I guess, a trust agreement was executed by Mr. Crane, I think, by which he deposited, undertook to deposit, in the Farmers' Loan and Trust Company, I think it is, these bonds of $450,000 of the Lebanon Springs first-mortgage bonds and a lot of other securities under a trust, by which if a large amount of money was paid for the bonds they might be recovered by the person who paid the money.

Q. Are those bonds deposited in the Farmers' Loan and Trust Company?

A. That is all I know of it; I understood they were; the gentleman who came to me, come to see if he could break that trust agreement or get some relief; he had advanced some consid-
658 erable money upon the face of it, and in that agreement was mentioned these 450 bonds.

Q. All you know is what you were told by somebody else?

A. Yes, sir.

Q. And the sight of the paper?

A. Yes, sir; which recited that they were on deposit there.

Q. Have you any other means of knowing how many bonds Mr. Crane had?

A. Except his statement and the exhibition of some of the bonds; I saw some of them; I think at one time he showed me something over $100,000 of them that he had got in.

Q. You didn't count them?

A. No, sir; I should judge so from the size of the bundle and his statement; that is the extent of the actual bonds I saw.

Q. Have you now given all the sources of your knowledge as to the number of bonds which he had?

A. His statement and what I saw of them and the trust agreement.

Q. You have said that you represented Mr. Crane in the Sackett suit; by virtue of what authority and when was it given?

A. About 1880, I think, was the first time I met Mr. Edward Crane; he was then brought in to me by Henry A. Tilden and he then stated he was aiding Mr. Tilden in his efforts to get the possession of this road back into the bondholders' hands and out of the hands of the trespasser, Russell C. Root, and was co-operating with him; that he was then a bondholder of the road and he desired us to act for him in that con-ection, and we did so.

Q. And that is all?

A. Yes, sir.

Q. Did you act for him in any way as far as disclosed by the records in the suit and in your testimony?

A. Yes, that is all.

Q. Give me the names of the persons who owned the remainder of the $1,600,000 of bonds which you have said that you represented.

659 A. I didn't say I represented $1,600,000; I said between $1,100,000 and $1,200,000.

Q. You said something about $1,600,000?

A. I said I had communicated with the holders first and last of about the $1,600,000.

Q. Give the names of those who represented the $1,200,000.

A. I will go on as far as I can; Samuel J. Tilden, executors of Oliver Charlick, Mr. Blood, Mr. Delancey, Mr. Crane, Mr. Henry A. Tilden, the estate of Moses Y. Tilden, Mr. Schell; I think that is about as far as I can go; I can't recall the rest of them; there was a lot of small holders, some held only one bond, they said, and some held two and some five.

Q. You have given all the names you can recall?

A. Yes, sir; I had a complete list, but those are the ones I first began to act for and I therefore recollect those people particularly because I had personal communication with them upon that.

Q. How many bonds had Samuel J. Tilden?

A. I think 150 bonds; 150 or 120.

Q. How many had the Charlick executors?

A. $50,000 face value.

Q. How many bonds had Mr. Blood?

A. Ten, I think.

Q. How do you know?

A. Because I have them to this day in my possession.

Q. How many had the Charlick estate?

A. Fifty I said.

Q. How many had Schell?

A. Seventy-five.
Q. How do you know?
A. He said so.
Q. That is all the knowledge you have?
A. Yes, sir, I took it for the truth.
Q. How many bonds had Henry A. Tilden?
A. Thirty, I think.
Q. How do you know?
A. His statement.
Q. That is all?
A. Yes, sir.
Q. How many had Moses Y. Tilden?
A. I have forgotten; I think it was less than thirty.
660 Q. How do you know?
A. Mr. Henry A. Tilden's statement about it.
Q. That is the only knowledge you have?
A. Yes, sir.
Q. By what authority did you represent, if you did so represent, Augustus Schell?
A. His.
Q. How was the authority given and when?
A. At Mr. Schell's house, about 1880, I should think, somewheres in that year.
Q. What did you say and what did he say?
A. I went to him with Henry A. Tilden and I stated to him the proceedings which had been begun, and I stated to him the necessity of then bringing other suits, and among other things, to enjoin the foreclosure of the five-million-dollar mortgage in Vermont; I told him it would necessarily incur expense and that we were going about among the bondholders to see whether they would any of them contribute something in the ratio of their holdings to defray the expenses which must be necessarily incurred in the conduct of the litigation to get the road back into the possession of the bondholders; I asked him if we would contribute something; we asked him first how many bonds he had and about Mr. Clarke's bonds; I asked him if he would contribute anything towards helping to defray the expenses and he declined to do so; he said he regarded them as worthless; they had been put away somewhere and he didn't know where he could put his hand on them, he had long since given them up as being of no value whatever, and he didn't propose to contribute to or mingle with any litigation whatever but whatsoever we did in the matter he would abide by, and if his bonds were of any use to us, he would hunt them up and give them to us, or if we could get along without them, it would save him some trouble, and whatever Mr. Tilden and I did would be satisfactory to him.
661 Q. What proceeding did you state to him had been begun?
A. I told him that the suit of Sackett against Root had been commenced; I told him what it was; I told him that Russell C. Root and the Harlem Extension South Coal Transportation Company had been running the road, and there didn't seem to be

any earthly reason why they should occupy the road to the exclusion of the bondholders, and the proceeding was substantially for the purpose of putting the road back into the bondholders for what it was worth; if it was worth anything to the transportation company to run it, it ought to be worth something to the bondholders to run it.

Q. Give the names of the other persons whom you communicated with to make up the difference between $1,200,000 and $1,600,000?

A. I can't give the names of any one; I have thought it over, I have hunted over the papers since here.

Q. As to the owners of the $400,000 of bonds, had you any knowledge as to their being the owners of any bonds or having any bonds except that somebody told you so?

A. Well, somebody told me; some of them told me so themselves by letter or otherwise, and Henry A. Tilden hunted up who the owner was and brought in the name and then I communicated with the person; I can remember now that one of them, I can't state his name, was the cashier of the bank at Port Jervis; I have had several letters from him, one I had recently asking to know what the outcome was.

Q. All you know of his having a bond is his saying so in a letter?

A. I think Mr. Tilden gave me the name on a list and I wrote him and corresponded with him.

Mr. Paige moved to strike out the testimony of the witness as to Augustus Schell and his ownership of the bonds, on the ground that it appears by his own testimony that all his knowledge upon that subject is hearsay.

662 The WITNESS: All I know is that he claimed to own seventy-five of them; I don't know actually that he had a bond.

Mr. PAIGE: He does not appear by any other evidence than hearsay to know that Mr. Schell had any bonds, and I move to strike out everything he has stated in regard to Mr. Schell having the bonds, as hearsay.

The COURT: I am a little in doubt about it, but I will allow it to stand.

Mr. PAIGE: I except, and I make the same motion as to what he has said in regard to their owning bonds of Henry A. Tilden and Moses Y. Tilden and Edward Crane except so far as the witness saw the bonds.

(Motion denied. Plaintiff excepts.)

Mr. Paige moved to strike out all the testimony of the witness as to his having communicated with persons who owned bonds which made up the difference between $1,200,000 and $1,600,000 on the ground that the witness' knowledge is derived from hearsay.

(Denied. Plaintiff excepts.)

By Mr. YARD:

Q. You were present at the sale under the Sackett and Root judgment?
A. Yes, sir.
Q. On whose behalf?
A. On behalf of Mr. Foster, Mr. Hazard and their associates.
Q. And representing them, did you bid in the property?
A. Yes, sir; and signed the terms of sale, I think, as trustee, is my recollection of it.
Q. And also representing Mr. Hazard?
A. Yes, sir.
Q. Afterwards you paid the amount bid on the property?
A. Yes, sir.
Q. Who furnished the funds?
A. Mr. Hazard and Mr. Foster.
Q. And the referee made a deed to Mr. Hazard and Mr. Foster?
A. Yes, sir.

By Mr. FOWLER:

663 Q. Was your authority from the bondholders to the amount of $1,200,000 ever revoked?
A. There has been no suggestion.
Q. You continue to act as counsel for the $1,200,000?
A. Just as much as I did.
Q. You never have taken any proceeding to test the regularity in any way of the sale of Sackett against Root?
A. No, sir.
Q. And so far as you are concerned your clients do not question the regularity of the proceedings in that suit?
A. No, sir.

The COURT: I did not pass upon Mr. Paige's objection exactly; as I regard all interests here hostile, under certain circumstances—this witness is called by Mr. Hale and is cross-examined by Mr. Fowler—I think as a cross-examination it is competent.
Mr. PAIGE: I except. He was called on behalf of Mr. Fowler and, therefore, Mr. Fowler is not cross-examining him.
The COURT: I will allow it to stand.

By Mr. FOWLER:

Q. Do you know that Hazard and Foster conveyed this property to the New York, Rutland and Montreal Railway Company?
A. I must be very careful now in what I say; I don't know whether I ever saw the deed or not; I think I did.
Q. Have you any knowledge in regard to the mortgage made by the New York, Rutland and Montreal Railway Company?
A. Nothing, except that derived from the possession of the mortgage; I have the mortgage.
Q. Do you know who drafted that mortgage?
A. No, sir; I do not.

By Mr. PAIGE:

Q. Did you have any authority other than you have stated from any owners of the bonds to use their names in the issuing of
664 certificates which would be liens upon the property?
A. No, sir; I never applied to them for that purpose.
Q. I simply want the fact.
A. No, sir.

DELOS MCCURDY recalled.

Examined by Mr. HALE:

Q. You have testified that you represented people claiming to own $1,200,000 of the bonds of the Lebanon Springs Railroad Company, in the case of Sackett *v.* Root; state whether that fact was announced to the court in the progress of the trial of Sackett against Root that you did represent parties to that amount?
Q. Yes, sir.

(Mr. Paige objects.)

The WITNESS: The announcement was made in court that Judge McClellan and myself represented $1,100,000 or $1,200,000 of the bonds of the Lebanon Springs Railroad Company.

(Mr. PAIGE:)

Q. That is, you stated that to Judge Westbrook?
A. Yes, sir; I did.
Q. Openly and in the presence of the parties?
A. Yes, sir; "right out in meeting."

Also from said printed case the testimony of Hamilton Harris, as follows:

HAMILTON HARRIS sworn and testified.

Examined by Mr. HALE:

Q. You are an attorney and counselor at law?
A. Yes, sir.
Q. Residing in the city of Albany?
A. Yes, sir.
Q. You have resided here and practiced law for many years?
A. Yes, sir.
Q. Were you retained as counsel for any one in the case of Sackett against Root?
A. Yes, sir; I was.
Q. By whom were you retained first?
A. I was retained in the first place by Henry A. Tilden, both for himself and his brother.
665 Q. His brother, Samuel J. Tilden?
A. Yes, sir.
Q. As bondholders of Lebanon Springs road?

A. Yes, sir; they claimed, I believe, to be large bondholders.

Q. Were you authorized to act for any one else by any one else?

A. Yes, sir; in this way—before I came into the case, there had been an application made for certain bondholders to be made parties to the suit, which application, I believe, was denied, but in denying it, an order was made by the judge that the bondholders who had made the application, although not permitted to be parties, yet they should have notice of all proceedings in the action, and Mr. F. L. Westbrook was the person named in the order upon whom service of notice was to be made for their benefit or on their behalf; after the case had proceeded somewhat and the orders *pro* and *con.* began to fly pretty thick, he, finding that he could not well attend to it, used to send them to me to act for him, so that whenever notices were served upon him he forwarded to me with the request that I should act for him and represent whoever he represented, which I did afterwards during the whole litigation.

Q. You were present at the hearing of the case?

A. Yes, sir.

Q. And at the time the decree was signed?

A. Yes, sir.

Q. And there is a recital that you appeared for certain bondholders?

A. Yes, sir; I appeared there for them.

Q. The recital is "Mr. Hamilton Harris, of counsel for the defendants who have appeared in this action, and also for the bondholders of the Lebanon Springs Railroad Company who have not been made parties to this action by name."

A. I appeared there as such.

666 Q. You were present as counsel for Judge Westbrook, were you not, at the legislative investigation that was had before a legislative committee in 1882?

A. Yes, sir; I acted for him as counsel in that investigation.

Q. You attended the hearings in New York city and in Albany?

A. Yes, sir; I attended all the hearings.

Q. Were you present when Mr. Park was examined as a witness?

A. Yes, sir; I cross-examined him.

Q. Will you state whether that investigation was a matter of general notoriety, published in the newspapers and commented upon?

A. Yes, sir; it was of great notoriety.

Q. Statements were made in the papers as to witnesses that were examined?

A. Yes, sir; quite full reports were made in all the New York papers at the time of the investigation and throughout the State, I think, more or less.

Q. When you speak of the application of the bondholders being denied, you refer to the order that was made by Judge Westbrook in which F. L. Westbrook was designated as the party upon whom papers should be served?

A. Yes, sir; a gentleman by the name of Bunnell made the ap-

plication, and I speak of the order that was made as the result of that application.

Cross-examination by Mr. PAIGE:

Q. When did your retainer in the suit of Sackett against Root take place first?

A. I don't know that I can give the exact date; it was while Mr. Van Valkenburgh was receiver and I should think about the middle of his administration; I should think it was about half way between his entering upon the road and his resigning as receiver; I don't know what years those were; I have forgotten the years.

Q. That was the time you were retained by Henry A. Tilden and Mr. Samuel J. Tilden?

A. Yes, sir; well, Mr. Henry A. Tilden retained me, and
667 not Samuel J.; Henry A. retained me for himself and Samuel J. Tilden.

Q. When was that?

A. I don't remember, I can't remember; there was so much of this matter that I have not carried it in my head at all.

Q. Give your best recollection.

A. I couldn't give you the date at all without looking at my bundle of papers, which I have not done; at the office I could give you the exact date.

Q. Was it not long prior to a contemplated resignation by Mr. Van Valkenburgh?

A. That was contemplated, but not by him, I think; it was contemplated by Mr. Tilden.

Q. Was the first action that you took in the suit in regard to that?

A. Yes, sir; I think it was, but the resignation was long after the first consultation and retainer.

Q. How long?

A. I should say a year; I wouldn't speak certainly about that; it may not have been more than six months, but the consultations and movements which we made resulted in that resignation.

Q. Did you do anything in regard to the case of Sackett against Root, except in the matter of Mr. Van Valkenburgh's resignation prior to the time it took place; were you employed in any other way about the suit except in regard to that?

A. I don't remember; I have no recollection now.

Q. Was your retainer by Mr. Tilden after the Ward-Westbrook investigation or before?

A. The attempt to impeach Judge Westbrook?

Q. Yes, sir.

A. Oh, long before that; before the attempt to impeach Judge Westbrook the retainer was, long before.

Q. Prior to the time that Mr. Van Valkenburgh resigned, can you remember anything you did in the suit on the retainer of Mr. Tilden or otherwise, except in regard to the matter of Mr. Van Valkenburgh's resignation?

668 A. I have already answered you that; I could not now recall any steps that were taken openly in court; there were various consultations, but all looking to that, but I don't recall any steps taken in court.

Q. Can you now recall any time when you appeared for Mr. Frederick L. Westbrook except upon the final hearing?

A. Oh, yes; I appeared at various interlocutory proceedings prior to the final hearing.

Q. I mean for Mr. Westbrook?

A. Yes, sir; for Mr. Westbrook; I have the papers in the office, I think, that he sent to me, various notices.

Q. About how early did that begin?

A. I should say a year or two prior to the final hearing; the final hearing, I think, was before Judge Cadman, as referee.

Q. No, the final hearing I refer to was before Judge Westbrook at Troy.

A. Judge Cadman made a report upon which the decree was entered, didn't he?

Q. No, I think not; the final hearing which was referred to in my question was the hearing before Judge Westbrook at Troy, which resulted in the final decree of sale in that action. (Presenting decree.) You see the decree purports to be the result of a trial of the issues, and it recites your appearance.

A. There were various proceedings before this decree upon which I appeared, but I can't recall them all; one of the principal ones was the month's trial before Judge Cadman, which was a year before this decree, and there were various interlocutory proceedings before that, but I can't now recall them.

Q. Did you appear upon that trial that resulted in that decree—did you appear upon that trial before Judge Westbrook, at Troy?

(Mr. Hale objects, as the record states who appeared.)

A. I was at Troy once or twice, but took no active part in it.

669 Q. While the trial was going on?

A. Yes, sir; if the trial was at Troy; I remember going up there, and being there once or twice, but I took no active part in the trial; the most active part I took in the whole proceeding was the trial before Judge Cadman, which lasted some six weeks, and in which I attended every day.

Q. Upon that hearing before Judge Cadman, for whom did you then appear?

A. For the defendants, and also for the bondholders.

Q. What defendants?

A. I should say the plaintiff, Mr. Sackett.

Q. And also for Mr. Westbrook in the way you have described?

A. Yes, sir; in the place of F. L. Westbrook.

Q. Did you not also appear for the receiver?

A. Yes, for Mr. Reynolds.

By Mr. LAROCQUE:

Q. In two or three instances the statement appears or has been

made that you appeared for the bondholders who were not parties; the only bondholders you assumed to appear for who were not parties, as I understand, were Henry A. Tilden, Samuel J. Tilden, and the persons embraced in the application which was made by Mr. Bunnell, and in which Mr. Westbrook was designated?

A. Yes, sir; those were the only ones I knew anything of.

By Mr. HALE:

Q. You were present when the decree was settled?

A. Yes, sir.

Q. You took part in the settlement of the decree?

A. Yes, some humble part.

Q. There was some discussion about it between Judge McClellan and yourself and myself?

A. Yes, sir; I had a little controversy with Mr. McClellan, which you may remember.

670 By Mr. FOWLER:

Q. I want to call your attention specifically to the order permitting the bondholders to appear through Mr. Westbrook, and to ask you whether you appeared pursuant to that permission in that order as counsel for Mr. Westbrook?

A. The order was the foundation of whatever I did; I can hardly say I appeared in pursuance of it because I appeared at F. L. Westbrook's request, and he acted under that order undoubtedly; the mode of doing it was that, after we had got fairly engaged, if any paper was served on Mr. Westbrook, in pursuance of that order, he generally sent it to me, and I appeared in his place; I have several of those papers which were served upon him, and which he forwarded to me, and which are now in my office in the bundle of papers relating to this case.

Plaintiffs' counsel also read in evidence as Exhibit No. 29, No. 73 of the Laws of Vermont for 1880.

Also Exhibit No. 30, an order and bond in an action in the court of chancery of Vermont in which Aaron R. Stevens was plaintiff, and The Union Trust Company and others were defendants.

Plaintiffs' counsel also read in evidence from said printed case all of the cross-examination of William Butler Duncan, as follows:

Cross-examination by Mr. PAIGE:

Q. You have said that you owned certain coupons of the Lebanon Springs bonds; how did you acquire title to them?

A. The Lebanon Springs road was not able to pay its coupons which returned in July, 1869, amounting to $70,000, and in January, 1870, and by advertisement I purchased these coupons.

Q. Were they presented at the counter of your banking-house and paid over the counter?

A. They were not paid over the counter; they were purchased

by notice; they were not paid over the counter as coupons
671 would be presented payable, and I don't recollect now where they were payable, but my impression is at the Union Trust Company, and I purchased them over my own counter.

Q. You published an advertisement?

A. Yes, my recollection is that we did; my recollection is it was advertised that we wanted to purchase the coupons, they were not presented at the Union Trust Company except they were refused there.

Q. The coupons that you held were of the issue of July, 1869, and January, 1870?

A. Yes, sir; of the maturity of those dates.

Q. The check you speak of remaining in the possession of the Union Trust Company was for $99,700 and odd?

A. Yes, sir.

Q. Which has been produced in evidence?

A. Yes, sir.

Q. That has never been paid?

A. No, sir.

Q. The five-million-dollar mortgage which was given by Hull and Lincoln to yourself and Park, was any money consideration given to them by you for that?

A. Except as stated in the mortgage itself.

Q. Was there any money consideration given?

A. No, sir; I think not.

By Mr. McCURDY:

Q. Are we to understand that when you went to purchase the Lebanon Springs road at the sale, you intended to purchase that road at that sale in your own interest and hold it individually?

A. Yes, sir, it was.

Q. I understand you to say that there was an understanding between you and Mr. Park as to the manner in which the road was to be bid off, and as to how it was to be held, and what was to be done with the bondholders?

A. Yes, there was an understanding subsequent to the purchase.

Q. Was there not before?

A. None definitely; it was indefinitely understood that we would do what was right.

672 Q. Do you think Mr. Park understood what your position was?

A. I think so.

Q. In his testimony before the investigating committee, Mr. Park, speaking of Mr. Duncan, said: "We held it for the bondholders; the bondholders would come and talk with us; different ones asked us what we meant, and Mr. Duncan and myself said, 'We mean to do by you just what we do by ourselves. Mr. Park is the largest bondholder; Mr. Duncan is next to the largest, and whatever is done by any one will be done by you outsiders.'" Was that statement true?

A. I infer he referred there to the intention we had.

Q. Was that statement true?

A. Not as read there.

Q. You think Mr. Park may have had a different intention from you?

A. No, sir.

Q. You think he may have suspected you of a different intention from what you had?

A. No, sir.

Q. He also testified that you were the real trustee; who were you trustee for?

A. I don't know why he made that statement.

Q. Why do you think he made it?

A. I can't conceive.

Q. You think it was an entire misapprehension upon his part?

A. I was acting with him; he might have meant I was his trustee.

Q. Hull and Lincoln afterwards gave you and Mr. Park a mortgage for five million dollars on the road?

A. Yes, sir.

Q. Do you mean to have us understand that that mortgage for five million dollars was the personal property of you and Mr. Park?

A. Yes, sir; I do.

Q. You hold it as such now?

A. It was the personal property of Mr. Park, I afterwards assigned or lodged that mortgage with the trustees under an agreement which I made in company with Mr. Park with certain
673 parties—I have forgotten the parties now; I accompanied the same with the satisfaction piece to take effect under certain agreement.

Q. Under that disbursement trust some $700,000 was paid?

A. Yes, sir.

Q. Was it your money and Mr. Park's money individually?

—. Yes, sir.

Q. You say you never had any such conversation as Mr. Peck says you had here when bondholders came to you and himself in reference to what you would do for the bondholders of the Lebanon Springs railroad?

A. I don't recollect seeing any bondholders except Mr. Wilber, to my recollection, except Mr. Tilden, with whom I never had any conversation upon that subject to the best of my recollection; it is a long while ago.

Q. That is the reason I call your recollection to it; are you quite sure you didn't see any other bondholders than Mr. Wilber?

A. To my best recollection.

Q. Were any bondholders present at the sale to bid?

A. Unless the Shaker that was present was a bondholder, there was nobody that I knew.

Q. How many bonds of the road did you hold at the time of the sale?

A. I can't recollect, sir.
Q. Did you hold any?
A. I held considerably many.
Q. How many?
A. Exceeding $100,000.
Q. Are you quite sure you held over $100,000 of the bonds at that time?
A. I don't know; I can't recollect.
Q. Are you quite sure you owned any at that particular time?
A. Yes, sir; I am quite sure.
Q. Tell me how many you owned?
A. I know we owned whether thirty-five or fifty-five or sixty-five I don't recollect.
Q. When did you dispose of those bonds?
A. I never disposed of them.
Q. Have you them still?
A. Unfortunately my assignee has them.

Q. Are all of the bonds of which you were an owner in the
674 hands of William D. Shipman, as assignee?

A. I believe they were.
Q. As assignee he brought an action in which he set forth the securities that he held; have you ever seen that complaint?
A. I don't recollect.
Q. Are you quite sure you never saw it?
A. I may have seen it.
Q. Then you don't remember how many bonds of the Lebanon Springs road he says he held, do you?
A. I have an indistinct recollection that in some paper he stated he held $25,000.
Q. Were these your bonds, or bonds that had been pledged with you as collateral security for a loan you made to Mr. Park?
A. They were my bonds.
Q. You are quite sure of that?
A. Perfectly.
Q. How many bonds of the Lebanon Springs railroad did Mr. Park own at that time?
A. He stated to me he owned $300,000.
Q. Do you know?
A. I know he had in my possession over $100,000, and perhaps the whole $300,000 that he stated he owned.
Q. Didn't you make an effort to collect in the bonds or get the signatures of bondholders?
A. Personally, I didn't.
Q. Who did?
A. I believe such an effort was made under the programme which was abandoned and which was referred to.
Q. Was not the book of subscription, or the book containing the signatures, or the paper in your office?
A. I have no recollection of any such book.
Q. Are you sure no such book was there?
A. I have no recollection; beyond that I can't be sure.

Q. Do you mean us to understand here that without any previous conference with the bondholders except Mr. Park, you and Mr. Park agreed between yourselves to go up there and bid off the road and own it?

A. As far as I am concerned, yes.

Q. That is what you intended to do?

A. Yes, sir.

675 Q. And without any conference with the other bondholders previous to that time?

A. I would state that I was the president of the Harlem Extension railroad, and this combination or arrangement which was subsequently abandoned was managed entirely outside of myself; I had nothing whatever personally to do with it beyond my official capacity as president of the road.

Q. The Lebanon Springs road was a part of the Harlem extension?

A. Yes, sir.

Q. You were the president of the Harlem extension?

A. Yes, sir.

Q. As president of the Harlem extension and a bondholder of the Lebanon Springs road, you intended, you say, to do precisely the thing you have said?

A. Yes, sir.

Q. Did you write a letter to the Union Trust Company as to what should be done with that check?

A. Such a letter was produced which I believe was a correct copy.

Q. What did you mean by that letter; do you call it a letter of instruction?

A. No, sir.

Q. What did you mean by it?

A. It was a personal letter addressed to Mr. Clarke, who was president of the Union Trust Company; I was coming up here without knowing what the purchase-money might amount to, and knowing it was a considerable amount and fearing I might be called upon to give a certified check to the referee or at the sale, I having, unfortunately, too good credit in those days, I asked Mr. Clarke, whom the referee represented, to authorize the referee to take my check.

By Mr. HALE:

Q. That was by the letter which has been introduced in evidence?

A. Yes, sir; I think so.

(Objected to that the letter speaks for itself.)

Q. Did you write him a letter afterwards?

676 A. I believe the letter handed in the other day is a true copy of the letter; I have no copy of it myself.

Q. Do you know why that check never was presented for payment?

A. I have a strong suspicion, that I held an amount of coupons necessary to absorb it if it was presented.

Q. What interest was that to the trust company?

A. I don't know.

Q. What did you mean by saying that you held enough to absorb it?

A. I held five coupons which by the decree were a first lien upon the proceeds of the sale which I certainly should have presented to the trust company and sought payment out of the proceeds of the sale.

Q. Did you have all of the coupons past due?

A. All that were past due at that time, I suppose; none were paid after that date.

Q. Did you hold all the coupons which were then due at the time you gave that check?

A. No, sir.

Q. You would have only shared *pro rata* with the others?

A. My recollection is that the decree orders the coupons to be paid in the order of their priority; I held the first non-paid coupons.

Q. You have said that you and Mr. Park held the five millions personally; do you recollect the testimony of Mr. Park that you and he held that five-million-dollar mortgage as the protection merely to the bondholders of the Lebanon Springs road—protecting the value of the property as bondholders and preventing thereby the acquisition of the absolute title of the New York, Boston and Montreal road?

A. I never saw that statement of Mr. Park until referred to in this trial; I don't recollect any such testimony.

Q. Wasn't that substantially true what Mr. Park stated?

A. No, sir; it was not.

Q. You think Mr. Park was mistaken?

A. Yes, I think he was mistaken, or the interpretation put upon his words was a mistaken one; I never saw the testimony until it was referred to.

677 Q. You didn't understand that the $5,000,000 in your hands represented the aggregate indebtedness of the two roads to make the Harlem Extension indebtedness?

A. The $5,000,000, as I understood it, represented the amount due to us under the contract we had made to transfer the Harlem Extension road to the New York, Boston and Montreal Company.

Q. Due to you and Mr. Park individually?

A. Yes, sir.

By Mr. HALE:

Q. You attended this sale at Greenbush or Bath and bid off that property, the Lebanon Springs railroad, in your own name?

A. I gave the name of Mr. Hull at the time.

Q. Was Mr. Hull there?

A. No, sir.

Q. What was Mr. Hull?

A. My cashier.
Q. He had nothing to do with the purchase personally?
A. No, sir.
Q. He didn't furnish any money to make the purchase?
A. No, sir.
Q. Is it a fact that he did not furnish any?
A. No, sir; he did not.
Q. The check that was given was your check on Duncan, Sherman & Company?
A. Yes, sir.
Q. Afterwards a deed was executed by the referee to Mr. Hull, was there not?
A. Yes, sir.
Q. Mr. Hull paid no consideration for that deed, did he?
A. No; I suppose not.
Q. You know he didn't, don't you; the check was the only consideration, and that was your check?
A. Yes, sir; on the face for it on account of Mr. Hull.
Q. Isn't it a fact that Mr. Hull didn't personally furnish a dollar toward the consideration?
A. Yes, sir.
Q. The same relation existed between Park and Lincoln that did between you and Hull?
A. I don't know what the relations were, I presume so.
678 Q. Didn't Mr. Park tell you that Mr. Lincoln was his bookkeeper?
A. I knew Mr. Lincoln's position as his cashier.
Q. Didn't you understand from Mr. Park that Mr. Lincoln's name was used in the purchase in Vermont precisely as Mr. Hull's was in New York?
A. I understood nothing at all.
Q. How long after that sale was it that the $5,000,000 mortgage was executed by Hull and Lincoln?
A. Two or three days I think.
Q. That was a mortgage for $5,000,000?
A. Yes, sir.
Q. Were these bonds issued under that mortgage?
A. No, sir.
Q. It purported to be a mortgage to secure $5,000,000 from Hull and Lincoln to you and Mr. Park?
A. Yes, sir.
Q. They didn't owe you any $5,000,000?
A. Only as represented in the mortgage.
Q. At the time that they executed the mortgage they didn't owe you and Mr. Park a dollar?
A. Mr. Hull owed him the expense of the referee's fees.
Q. That was merely because you used his name in the purchase?
A. Yes, sir.
Q. He had made no request of you to buy this in his name?
A. Yes; he made a request of me to take it in his name.
Q. Didn't you make a request of him to use his name; didn't

you request the privilege of him to use his name in making that purchase?

A. My recollection is that Mr. Hull's name was used at the suggestion of Mr. Park; Mr. Hull asked my permission to say to Mr. Park that I might use his name.

Q. Do you mean that?

A. That his name might be used in this purchase.

Q. Mr. Park didn't make the bid at Bath?

A. No, sir; he was present, though.

679 Q. You made the bid and gave the name to the referee of Mr. Hull, who was your cashier?

A. Yes, sir.

Q. When this mortgage was executed by Hull and Lincoln to you, did that mortgage represent any indebtedness of Hull and Lincoln to you?

A. No, sir.

Q. Was there any money loaned by you and Park to Hull and Lincoln at the time of making the mortgage?

A. No, sir.

Q. You know there was not?

A. I suppose not.

Q. You know there was not, don't you; you know there was no loan of $5,000,000 from you and Park to Hull and Lincoln?

A. Yes, sir.

Q. And the mortgage was made to you with the view of your turning right over to the New York, Boston and Montreal Railroad Company?

A. Yes, sir.

Q. The object of it was when you conveyed it to them it might be subject to this mortgage of $5,000,000?

A. Yes, sir.

By Mr. LAROCQUE:

Q. I understand you to have said that although there was no agreement or understanding between you and any of the bondholders preceding the sale of the Lebanon Springs railroad that you should purchase or act for anybody but yourself, your intention was, after discharging the personal obligations and prior equitable claims, if there was any surplus, to use the surplus for the benefit of all of the bondholders alike?

A. Yes, sir.

Q. And the only difference between you and these gentlemen is while it has been claimed you assumed to act for them, from your standpoint you declined to act for anybody but yourself, but your intention was to deal equitably with everybody after discharging the obligations and the prior equities?

A. Yes, sir.

680 Q. This $5,000,000 represented the assumed aggregate amount of the secured and unsecured indebtedness of both branches of the Harlem Extension railroad?

A. In round numbers.

Q. It was intended to represent that, and the object of the mortgage was that when the property should be transferred to the New York, Boston and Montreal road there should be a lien upon it?
A. Yes, sir; for what Mr. Park and I had purchased.

By Mr. PAIGE:

Q. The coupons you have spoken of as having purchased, were they purchased by yourself, or by the firm of Duncan, Sherman & Company?
A. By the firm of Duncan, Sherman & Company.

By Mr. FOWLER:

Q. At the time this mortgage of $5,000,000 was made Hull and Lincoln were not in possession of the Lebanon Springs railroad?
A. Except so far as the deed gave them.
Q. They were not operating it and using physical possession of it?
A. No, sir.

Plaintiffs' counsel also read in evidence as Exhibit No. 31 a deed from Charles S. Fairchild, referee, to James C. Hull, being a referee's deed in the foreclosure action brought by the Union Trust Company of New York and a record of said deed as filed in the counties of Rensselaer and Columbia in February, 1873.

It was admitted that the New York Loan and Indemnity Company was before the beginning of this action dissolved as a corporation, and that the defendants whose names are in the proper allegations of the complaint, are the survivors of those who were the directors of that company.

Plaintiffs' counsel then read from said printed case a portion of the testimony of Frederick L. Westbrook as follows:

681 Mr. PAIGE: I desire to read from the testimony of Frederick taken in the Ward-Westbrook investigation, at page 1555, as follows: "The order was made, and I acted under it." I state that by "the order" was meant the order appointing Frederick L. Westbrook as the person upon whom papers were to be served.

Also at page 1556, "The first action I think I took was to receive a notice of trial for Rensselaer circuit, which I think was held the first Monday in February, 1881; then a petition and notice was served upon me in behalf of the receiver—notice of motion for leave to issue certificates; on the return day of that notice I appeared and opposed."

Also, "And somebody suggested that an expert be appointed to go over the road to see and report as to its condition, what was required to put it in running order, and the amount that would be necessary for such purposes; James H. Jones, the superintendent of the Walkill Valley railway, was so appointed; he subsequently reported to me personally what conclusions he had arrived at; I asked him to delay making his report until I could see my clients; I came to New York and reported to them what he said, and I then saw the two Bloodgoods, Mr. Bunnell and Mr. McCullough, and it resulted

in my saying to Mr. Bloodgood, through whom I had received my employment, that I would withdraw from the case; that I would no longer continue to act, and the reason was that he no longer continued to pay, and informed him that under the order made in the case that the copy of the petition with notice for leave to issue the certificates would be served upon me, and that when I received these I would send them immediately to him; and I did receive them and send them by express to John Bloodgood.

Q. Now, have you stated fully all your connection with the
682 matter?

A. All my connection with the litigation; I have not stated fully my several interviews with those gentlemen."

It was admitted that the application of Messrs. Park and others in the Sackett suit was never granted; that such application was made and not granted.

Plaintiffs' counsel then read in evidence in behalf of the plaintiffs Harper W. Rogers, Andrew A. Douglass and Nancy E. Wilbur, respectively, the following affidavits:

COLUMBIA COUNTY, *ss:*

Harper W. Rogers, being duly sworn, says that he is the owner of bond number 172 of the bonds issued by the Lebanon Springs Railroad Company, dated 1st July, 1867, and that he has owned said bond ever since the year 1867.

HARPER W. ROGERS.

Sworn to before me this 4th day of March, 1889.

ABRAHAM S. PEET,
Notary Public, Col. Co., N. Y.

NEW YORK COUNTY, *ss:*

Andrew A. Douglas, being duly sworn, says that he is a trustee under the last will and testament of William Henry Douglas, deceased, affiant's brother, who died at Buffalo, N. Y., in 1875, leaving the said last will and testament which was admitted to probate there. That as such trustee he holds the following bonds of the Lebanon Springs Railroad Company, which are all dated first of July, 1867, and are numbered as follows: 457, 455, 456, 460, 461, 462, 463, 464, 465, 466, 467, 468 and 469 of $1,000 each, and 2060, 2061, 2062 and 2063 of $100 each. That such bonds came into possession of
683 affiant as assets of the estate of his deceased brother, and that his said brother had a contract for the construction of part of the railroad of said company under which he performed work upon its original construction. That affiant as such trustee also owns one bond of the Harlem Extension Railroad Company numbered 910.

A. A. DOUGLAS.

Sworn to before me, this 4th day of March, 1889.

GEORGE O. VANDEBOGART,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

STATE OF NEBRASKA, }
County of Douglas. }

Nancy E. Wilbur, being duly sworn, says that she is the owner of one bond for one thousand ($1,000) dollars, number 198 of the bonds issued by the Lebanon Springs Railroad Company, bearing date the 1st day of July, 1867. That she inherited the same from her sister, Elvira E. Peabody who died 21st August, 1881.

NANCY E. WILBUR.

Sworn to before me, this 11th day of February, 1891.

W. H. WILBUR,
Notary Public.

Also the bonds mentioned in the said affidavits.

Plaintiffs' counsel also offered in evidence on behalf of the plaintiff, Ida S. Harrison, fifty bonds, the numbers of which are given in the affidavit on which the motion was granted bringing her in as a party.

This evidence was objected to by Mr. Hale, of counsel for the Central National Bank of Boston, and other certificate-hold-
684 ers, and by Mr. McCurdy, of counsel for the parties represented by him, on the ground that there was no evidence that the plaintiff, Ida S. Harrison, was the owner of the bonds, and no evidence that the bonds were not represented in the Sackett suit, or that they were not produced at that time. This objection was overruled and each of said counsel excepted to such ruling.

Plaintiffs' counsel then produced the bonds as from the possession of the plaintiff, Ida S. Harrison, as her attorney of record in the action.

Counsel for the Central National Bank of Boston insisted that in an action of this kind the production of the bonds was not sufficient evidence to give the alleged owner the standing in court to maintain this action, and objected to the admission of the bonds in evidence on this ground. (Such objection was overruled, and said counsel excepted.)

The plaintiffs here rested.

Counsel for the defendants The Central National Bank of Boston and other certificate-holders then moved to dismiss the complaint upon the following grounds:

First. For the reason that the plaintiff has failed to show such a relation to the subject-matter and to the bonds which he claims to own as entitles him to the interposition of the court in his behalf.

Second. The plaintiff has proved that there was a foreclosure and sale under the decree in the suit brought by the trustee under this Lebanon Springs Railroad mortgage a conveyance of property to the purchaser, the execution of due liens by the purchaser and the transfer to a new party. Assuming that to be so, then there is no such thing as a bondholder of the Lebanon Springs railroad under the Union Trust Company mortgage in existence, and
685 there is no such mortgage in existence. There was a judgment and sale and conveyance under the order of the court

to the purchaser, so there is no mortgage here now to be enforced. On both grounds I move for a dismissal of the complaint.

Mr. HALE: On behalf of the certificate-holders, I move that the complaint be dismissed as to them on the ground that it appears by the evidence already in that in a decree in a suit in which the bondholders of the Lebanon Springs Railroad Company were represented by Marvin Sackett, the validity of these certificates has been established and the certificates have been adjudged to be a lien upon this property to the extent of the entire amount unpaid at the time of the decree. And that there being no evidence that the bonds presented here as belonging to the plaintiff Stevens were not represented in that suit, the presumption is that they were actually in fact represented by Marvin Sackett in that suit, and that the legal presumption is that they were so represented. (Motion denied; exception.)

Mr. MCCURDY: On behalf of the defendants Foster and Hazard, I move to dismiss the complaint on the ground that the decree in the Sackett suit was conclusive upon everybody. There is no proof here that there was not actual representation of the bondholders in that suit; it has been shown inferentially that there was no virtual representation of the bondholders by showing that the Union Trust Company under the two-million-dollar mortgage was not made a party. (Motion denied; exception.)

Mr. HALE: I add to my grounds of motion that plaintiff has made no proof showing that he has any equity or that he has any standing in court to maintain a suit in the nature of a bill in equity, and, therefore, his complaint should be dismissed.

Mr. LAROCQUE: On behalf of the defendants represented by me I add to the grounds before stated, the ground stated by Mr. Fowler, viz: that by reason of the laches and lapse of time the plain-
686 tiff has lost his chance to intervene. I make that motion on behalf of Mr. Duncan and Mr. Shipman. (Denied; exception.)

Mr. JENNINGS: I make a similar motion to the last one of Mr. Larocque as to my client.

Each of the defendants made the same motions to dismiss the complaint on the grounds above stated. These motions were each of them severally denied, and the counsel for each of said defendants duly excepted.

Said defendants also and each of them moved to dismiss the complaint upon the additional ground that the complaint charges that the action of Sackett against Root was a collusive action brought and maintained by the plaintiff in that action for his own benefit, and in fraud of the rights of the bondholders, and that there is no evidence in this action offered by the plaintiff showing or tending to show any fraud or collusion on the part of the plaintiff or any one connected with the matter. This motion was also denied and each of said defendants duly excepted.

Counsel for the defendant, Central National Bank and other certificate-holders, then offered in evidence the stipulations appearing above on pages 142 and 143.

It was agreed and understood that the petition with the memorandum of decision and order, as above set forth, were in evidence as part of Lyman B. Bunnell's testimony.

Counsel for Central National bank and other certificate-holders then offered in evidence the testimony of William F. Taylor from said printed case as follows:

WILLIAM F. TAYLOR, being sworn, testified as follows:

Examined by Mr. HALE:

Q. Where do you reside?

A. Berlin, in this county.

687 Q. And how long have you resided there?

A. Nearly all my lifetime.

Q. Were you one of the railroad commissioners of Berlin?

A. I am now, and have been for the past eight or nine years.

Q. When you became such commissioner did the town hold bonds of the Lebanon Springs Railroad Company?

A. Yes, sir.

Q. To what extent?

A. $46,000.

Q. When did you become commissioner?

A. I think it was in 1880 or 1881.

Q. Does the town still hold these bonds?

A. No, sir; they don't.

Q. What has become of them?

(Mr. Paige objects as immaterial; overruled; exception.)

A. They were sold to Edward Crane, I think.

Q. When?

A. I can't tell you now exactly when.

Q. You were instrumental, weren't you, in procuring the passage of an enabling act, authorizing the town to sell?

A. Yes, sir.

Q. It was after the passage of that act?

A. Yes, sir.

Q. How soon after?

A. The next year, I think.

Q. You are acquainted with Marvin Sackett?

A. Yes, sir.

Q. How long have you known him?

A. Twenty or twenty-five years.

Q. You heard of his suit against Mr. Root?

A. Yes, sir.

Q. You knew of that, and knew of the appointment of John W. Van Valkenburgh as receiver of the road?

A. Yes, sir.

Q. The road goes through the town of Berlin?

A. Yes, sir.

Q. Mr. Van Valkenburgh was in possession of the road for some years as receiver?

A. Yes, sir.
Q. Are you the person who made the application in that suit for land damages against the railroad?
A. Yes, sir.
688 Q. And an award was made to you by Judge Strait?
A. Judge Strait, as referee.
Q. You were paid by the receiver moneys for the land taken by the railroad?
A. Yes, sir.
Q. This judgment here shows the amount was $2,500?
A. Yes, sir.
Q. That amount was paid to you by Mr. Van Valkenburgh, as receiver?
A. Yes, sir.

Mr. Hale offered in evidence the judgment-roll upon the reference report in the suit of Marvin Sackett against Russell C. Root in the matter of the claim against the Lebanon Springs Railroad Company.

Q. Who were your co-commissioners of your town?
A. H. C. Gifford and A. M. Hull.
Q. Have you knowledge of the sale to Mr. Crane of the bonds of other towns besides Berlin?
A. I did have.
Q. What towns?
A. Stephentown.
Q. Do you remember the amount?
A. $30,000; Petersburgh was negotiated for by me; I don't know whether he ever had them or not; I know it was the expectation that he would have them.
Q. What did you get for the Berlin bonds?
A. Twenty per cent.
Q. The others were sold at the same rate?
A. I understood that was the price.

By Mr. PAIGE:

Q. Do you know?
A. I only know about my own town.

The judgment-roll is here marked "B—S. C. R."

Q. Give the date of the sale of the bonds of your town as near as you can?
A. There is nothing to call it to my mind now; I think it was about 1884, as near as I can tell.
Q. When was the act passed by the legislature?
A. I think about 1880.

Mr. HALE: 1882, I think it was.
689 The WITNESS: I think it was a couple of years or so after the passage of the law.

Also the testimony of Hugh W. McClellan from said case as follows:

HUGH W. MCCLELLAN, sworn and testified.

Examined by Mr. HALE:

Q. You are a counselor-at-law, residing in Chatham?
A. Yes, sir.
Q. You were one of the attorneys for the plaintiff in the suit of Sackett against Root and others?
A. Yes, sir.
Q. Your firm was McClellan & Brown?
A. Yes, sir.
Q. You had the conduct of the proceedings as attorney in that suit?
A. Yes, sir.
Q. From the beginning to the end?
A. Yes, sir.
Q. Your suit was brought, it appears by the record, in the name of Marvin Sackett, plaintiff, suing as well for himself as others similarly situated?
A. Yes, sir.
Q. You were employed by others besides Marvin Sackett in that suit?
A. I was spoken to in regard to it.
Q. State by whom.
A. I was spoken to in regard to it by Henry A. Tilden, and once by Samuel J. Tilden; I don't think now of others.
Q. Do you remember having any conversation with Edward Crane at any time?
A. Oh, yes; I had talk with him after the commencement of the suit.
Q. And with Mr. Vanderpoel, as executor of Oliver Charlick?
A. Yes, sir; that was before the suit also; he was counsel with me before the commencement of the suit; he and Mr. Robert E. Andrews, of Hudson.
Q. Were you present at the argument of the motion, at Kingston, that was made by Mr. Bunnell?
A. Yes, sir.
690 Q. Do you remember seeing Mr. McCul'ough there also?
A. Yes, sir.
Q. Did he present a petition there on behalf of Duncan and Park?
A. Yes, sir; he did.
Q. And ask to have them made parties to the suit?
A. Yes, sir.
Q. Both motions were denied?
A. Yes, partially.
Q. You are familiar with the order which I read here this afternoon, appointing F. L. Westbrook?
A. Yes, sir.

Q. By the way, was there an order entered on Duncan and Park's petition, also?

A. I can't tell you whether there was or not; I never entered one; I don't think there was any entered from the fact that it was stated there by the court that other bondholders would be represented by their counsel (Mr. Westbrook), who took a part in the argument of that case.

Q. For the other bondholders?

A. Yes, sir; Mr. Bunnell was there with him also.

Q. After the granting of that order, will you state whether the order was complied with by the plaintiff's attorneys in regard to serving papers upon Frederick L. Westbrook?

A. Yes, sir; no move was made by the plaintiff's attorneys where Mr. Westbrook did not have notice of the other parties.

Q. Had Mr. Westbrook notice of the trial of the case?

A. Yes, sir.

Q. And of the application for the decree being settled?

A. Yes, sir; I don't know as he personally had application for the settlement of the decree, because upon the trial of the case and after the reference which was had in regard to settling the accounts of the receiver, Mr. Hamilton Harris professed to be acting for Mr. Westbrook and at his request, and he appeared upon the trial for Mr. Westbrook and upon those other occasions.

691 Q. Do you remember that Mr. Harris appeared at the time the decree was signed in Albany?

A. Yes sir.

Q. And the decree recites his appearance?

A. Yes, sir.

Q. And he was actually there?

A. Yes, sir.

By Mr. PAIGE:

Q. Judge McClellan, do you recollect that Mr. Harris appeared upon any particular proceedings for any other purpose than as stated in the record of the proceedings?

A. For any other parties than those named in the record of that particular proceeding?

Q. Yes, for instance——

A. (Interrupting.) I know, from hearing Mr. Harris state so, that he appeared for Mr. Westbrook, and claimed to be authorized to be—he represented the parties whom Mr. Westbrook was to represent.

Q. I don't make myself intelligible; for instance, he appeared upon the record for the receiver at the signing of the final decree, as the record recites; did Mr. Harris say to you upon that occasion, for instance, that he appeared for anybody except for the receiver as named in the record?

A. I can't tell you the particular occasions, but I know he has stated it upon two different occasions to me; whether it was the specific occasion you mean I can't tell you; I don't know but that

was his only authority to act; I don't know of his being authorized in any other respect to act.

Q. But was it in connection with any specific proceeding that he said it, or did he say it in general conversation?

A. It was in regard to the proceedings taking place; the question would arise if notice had been given, etc., I can't recall the proceedings.

Q. That didn't occur until very near the time of the trial
692 of the Sackett suit—Mr. Harris's first appearance didn't begin until very late in the action?

A. Mr. Harris didn't appear in it until some time before the trial but I don't know how long; you know about it yourself for you appeared about the same time yourself.

Q. It was some years after the issuing of the certificates by the receiver that Mr. Harris first appeared?

A. I don't know when the certificates were issued; I didn't attend either time.

Q. Did Mr. Harris appear in the matter at all prior to 1884?

A. I should suppose he did.

Q. Prior to 1884?

A. I guess so; I should think so.

Q. Did he appear prior to the year 1883?

A. When was Mr. Reynolds appointed receiver?

Q. July, 1883.

A. Well, then Mr. Harris was acting in it before that time.

Q. How long before that?

A. I can't tell you.

Q. Only a little or a good deal?

A. Well, that I can't tell you because there was no proceeding in the action that required it, but I know that he appeared for the parties that I presume he represented in regard to the change of the receivership; I was not there myself either.

By Mr. HALE:

Q. Mr. Paige was in the case as counsel for the plaintiff in some portion of it, wasn't he?

A. I suppose so; I don't know who he acted for; he didn't appear for any defendant, surely, at least, I couldn't conceive that he did from anything he did; I think he opposed some of Mr. Harris's moves about it; I think you (Mr. Hale) figured in it in some motions at Kingston; you were there for the certificate-holders I think, you and Mr. Hyde.

By Mr. FOWLER:

Q. So far as you know, has your authority ever been revoked to act as attorney?

A. Never, sir.

693 Q. The clients you have been representing and now present, I understand, make no complaint of the regularity of the proceedings and of the sale in the case of Sackett against Root.

A. They never did.

Q. And do not now?
A. And do not now.

By Mr. HALE:

Q. How many of these bonds have you had in your possession or have you still in your possession of the Lebanon Springs Railroad Company?
A. Well, beside the bonds mentioned in the complaint in the Sackett suit (those were Sackett bonds) something over $100,000; I have got them yet.
Q. By whom were they delivered to you?
A. They came to me, I think, mostly from John Van Valkenburgh; now, I didn't mean Sackett bonds; there was over $100,000; I can't tell you exactly.
Q. Besides that you represented the bonds which were testified to by Mr. McCurdy in the suit?
A. Yes, sir; a good many of those he named I supposed I represented because the people talked about it, both Mr. Vanderpoel and Mr. Tilden.
Q. These bonds (the $100,000) you have are entirely in addition to those?
A. Yes, sir.

It was admitted that the plaintiff, Stevens, has no bonds which were acquired by him earlier than November, 1886.
Counsel for certificate-holders also offered in evidence the testimony of John W. Van Valkenburgh from said case as follows:

JOHN W. VAN VALKENBURGH, sworn and testified:

Examined by Mr. HALE:

Q. Mr. Van Valkenburgh, you were the receiver of the Lebanon Springs railroad referred to in the order which has been introduced in evidence here?
A. Yes, sir; I was.
694 Q. You were also appointed in another suit which was brought by the People of the State of New York against the Lebanon Springs Railroad Company?
A. Yes, sir.
Q. You are the person named in the order in that suit?
A. Yes, sir.
Q. I notice in the order ap-ointing you receiver that provision is made that the said receiver do cause to be ascertained and prepared, as near as he may be able to do so, a statement of the bonds of the said railroad and who owns and holds the same; did you do anything to ascertain the names of the bondholders referred to in the order?
A. Yes, sir.
Q. State what you did in that regard?
A. I sent letters to every person that I could learn or knew of being a bondholder of the railroad; I sent a good many letters; some I got answers to and some I didn't.

Q. What was the character of the letters you sent?

A. Well, simply an ordinary letter to the different ones asking them what bonds they held, and how many, etc.

Q. Was the letter written by you as receiver?

A. Yes, sir; I am speaking now as a receiver.

Q. Did it speak of the plaintiff's suit in which you were appointed receiver?

A. Yes, sir.

Q. Have you any of the answers to those letters?

A. I think I have.

Q. Have you them with you?

A. Yes, I guess so. (Producing same.)

Q. Before that I will ask you a question or so more; did the books of the railroad company come into your possession as receiver?

A. Not all of them.

Q. Did you make any inquiry for the book which would show to whom bonds were issued?

A. Yes, sir.

Q. Did you find any such book?

A. No, sir; I made a demand upon Mr. Root, who was the
695 secretary of the railroad, and I made a demand of William Butler Duncan; Mr. Root said that Mr. Duncan had them, and when I went to see Mr. Duncan he said that Mr. Root had them; part of the books, or a great many of them, I received from Mr. Duncan's office, but not all of them; the books in regard to the issuing of the stock, some of the stock books I got, but none in regard to the bonds.

Q. You found no book in relation to the bonds?

A. I don't think so; my recollection is we didn't.

Q. How did you ascertain where the bonds were in order to send out this letter and notice?

A. From different individuals; I think I procured the most of my information from Henry A. Tilden.

Q. Did you make diligent inquiry to find where these bondholders were?

A. Yes, sir.

Q. And who they were?

A. Yes, sir.

Q. Did you ever find any statement as required by the order stating the bonds and who owned them and hold the same?

A. My impression is, and the best of my recollection is, that I did with Judge Westbrook.

Q. At Kingston?

A. Yes, sir.

Q. How many did you ascertain?

A. I don'- think I could get at that very definite.

Q. While you were receiver did you come in contact with bondholders and persons claiming to be bondholders?

A. Yes, sir.

Q. Mention some of them.

A. Well, I came in contact with Mr. Henry A. Tilden; I had a talk with Mr. Schell at one time about his bonds; also Samuel J. Tilden I came in contact with.

Q. Mr. Vanderpoel, as executor of Oliver Charlick?

A. Yes, sir.

Q. With the town commissioners?

A. Yes, sir.

Q. With Edward Crane?

A. Yes, sir.

Q. Judge McClellan testified that he has some bonds that were delivered to him by you, something over $100,000; what was the precise amount?

A. I think it is about $116,000; $115,000 or $116,000.

696 Q. Where did these bonds come from?

A. Well, $20,000 was the town of Petersburgh.

Q. Who was the commissioner of that town?

A. I don't know.

Q. Did they come to you through Mr. Crane?

A. No, sir, through Henry A. Tilden; Mr. Tilden brought the commissioners of the town of Petersburgh down to Albany, and said he had them there, and said he wanted the money to pay for the town bonds of Petersburgh, as he wanted to take them to New York to Mr. Crane; I advanced him the money; I never got Mr. Crane nor any one else to pay me, and I have the bonds at the present time; they were part of the bonds I gave to Mr. McClellan.

Q. Have you any objection to stating the amount you advanced upon these bonds at that time?

A. No, sir, I don't know that I have.

Q. State how much.

A. I gave Henry A. Tilden $4,000, and he wanted a separate check for $520, which I have now.

Q. That was for the $20,000?

A. Yes, sir.

Q. You mean the $520 for the $20,000?

A. Yes, sir; I gave two checks, one for $4,000 (that was for the $20,000 of bonds), and the other was for $520 that went to Mr. Tilden; I don't know what it was for.

Q. What did you pay for the other $80,000?

A. Oh, some of them I got at about the same rate and some a little less.

Q. About what year was that you bought those bonds?

A. It was July 12, 1881, that I bought the Petersburgh bonds for Mr. Crane, or rather I gave the bonds to Mr. Tilden, and he agreed to get me the money from Mr. Crane; the others I bought in 1882; I don't own the whole of the others; there was—I don't recollect how many now—quite a *un*mber of other bondholders that sent bonds to me, wanting me to represent them or take care of them in any proceedings or transactions that might come out; I didn't

697 own those bonds myself individually; I only owned $40,000 myself; I handed those over to Mr. McClellan; I gave a re-

ceipt to them for them; then I took a receipt from Judge McClellan.

Q. Can you state who those bondholders were?

A. Ira Thorn was one, Mr. Melcher and Mr. Brower; Mr. Brower lives in New Jersey and Mr. Thorn at the Fifth Avenue hotel and Mr. Melcher in New York.

(Mr. FOWLER:)

Q. The Paran Stevens estate; Melcher, the Victoria hotel?

A. No, sir; I think not; his name is John L. Melcher.

Q. Those bonds were handed to you for the purpose of being represented in this proceeding or suit?

(Objected to.)

Q. Is that a fact?

(Objected to.)

The COURT: Let him state what occurred.

Q. What did they state to you; you gave them a receipt and took a receipt from Judge McClellan for them?

A. Yes, sir.

Q. That was about 1882?

A. Yes, sir.

Q. Now you may produce the letters you received from the bondholders.

A. There is one in answer to the communication I sent out inquiring who were bondholders and what they owned in trying to comply with the order made when I was appointed receiver.

Q. This is a letter dated May 11th, 1886, but acknowledges the receipt of a letter of November 16, 1881?

A. Yes, sir.

Q. Do you think that was about the time you notified these parties?

A. Yes, sir; that was in answer to one I sent out.

(Mr. PAIGE:)

Q. The notices you sent out, I think you said, were that you had been appointed receiver and asking for information as to who owned bonds?

A. Yes, sir; that is about the purport of the letters.

698 (Mr. HALE:)

Q. You sent such letters to all the bondholders you could hear of?

A. Yes, sir.

(Mr. LAROCQUE:)

Q. And those are the answers you got?

A. Those are some of them.

By Mr. PAIGE:

Q. All you know about their being bondholders is that you were told so by other people?

A. No, sir; I received letters from quite a number of people who said they were bondholders.

Q. The list you made out and the notices you sent you got the information from whom they were as well as you got from other people, and sent out notices accordingly?

A. Yes, sir.

Also the judgment-roll in the action brought by William V. Reynolds, as receiver of the Lebanon Springs Railroad Company against the Central National Bank of Boston, showing that the complaint in said action prayed that it be adjudged and decreed that the defendant became and was wrongfully possessed of its certificates and the coupons attached thereto without consideration and that it had no right, title, or interest therein, and that the said certificates and coupons were of no force or validity in its hands against the plaintiff as receiver, and the bondholders whom he represents, and that the said certificates and coupons be delivered up by the said defendant to said receiver to be canceled by him, and for other relief; that the said Central National Bank of Boston by its answer denied the allegations of the complaint and alleged that it was the lawful holder and owner of the said receiver's certificates amounting to $250,000, and made other defenses, and that an order was thereafter made at the special term directing the receiver to discontinue the action against the said Central National bank and to pay to
699 the defendant in said action its costs; that an appeal was taken from said order, which appeal was afterwards dismissed, and that on the 28th day of November, 1885, judgment was rendered upon the said order in favor of the Central National Bank of Boston against the said Reynolds, as receiver, dismissing the complaint with costs.

Plaintiffs' counsel objected on the ground that it was a transaction between different parties, and could not affect any parties to this action, but the same was received in evidence.

It was admitted that all the corrections appearing on page 816 of the printed case should stand as made at this hearing.

Counsel for said certificate-holders also offered in evidence from the files in the Albany county clerk's office a summons and complaint, affidavit and order in the case of The People of the State of New York against The Lebanon Springs Railroad Company. Said summons and complaint were signed by Hamilton Ward, attorney general. The complaint alleged the insolvency of the Lebanon Springs Railroad Company and that it had for one year past neglected and refused to pay its notes and other evidences of debt, and that it had suspended the ordinary and lawful business of the corporation for more than one year, and that the railroad had not been operated by the corporation defendant for more than five years, and prayed judgment that said corporation be adjudged insolvent; that it be dissolved, and surrender its rights, privileges

and franchises, and that a receiver of the property and effects of the defendant be appointed pursuant to the provisions of the Revised Statutes. The order dated December 4, 1880, appointed John W. Van Valkenburgh as receiver of the defendant The Lebanon Springs Railroad Company, its property and franchises, conferring
700 upon him all the powers and authorities, duties and liabilities of a permanent receiver, except that he make no distribution among the stockholders or creditors before final judgment, and provided for the execution of a bond in the penal sum of $5,000 by said receiver to the people of the State of New York with at least two sufficient sureties.

Also the bond of John W. Van Valkenburgh as receiver in said action, being a bond with sureties pursuant to the said order.

Plaintiffs' counsel objected, and also the defendants represented by Mr. Larocque and Mr. Jennings, to the admission of this testimony, and each and every part thereof, on the grounds: First, because there was no such person as the defendant named in existence at the time of the action, and had not been for many years; and, second, because neither of the parties to the action, if such parties existed, are parties to this action, nor at all represented in it. But the objection was overruled, and the same was received in evidence.

Counsel for the certificate-holders also offered in evidence a petition and notice of motion and affidavit of service in the case of Marvin Sackett against Root and others, and also in The People against The Lebanon Springs Railroad Company, the petition being of the Central National Bank of Boston to be made a party defendant in the action of Sackett against Root and others, and the notice of motion being a notice that the petition would be presented to the supreme court at a special term at Kingston, on the 8th day of September, 1883, and the court then and there asked for the order and relief prayed for in the petition.

Also a stipulation in the same case, which petition, notice of motion, affidavit and stipulation were received in evidence and marked Defendants' A.

701 The following is a copy of the stipulation:

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

A motion having been noticed for Saturday, the eighth of September, instant, on the petition of the Central National Bank of Boston, it is hereby stipulated by and between the attorneys for said petitioner, and the undersigned E. W. Paige as counsel representing the plaintiff in the above-entitled action, and William V. Reynolds, Esq., receiver, that the said motion be withdrawn, and the hearing thereof postponed upon the following conditions:

I. Notice is to be given to Hale & Bulkeley, attorneys for said petitioner, of any proceedings or motion that may be had or made in said actions, so as to enable them to appear and protect the interest of the petitioner thereon.

II. The withdrawal of said motion is to be without prejudice to the removal thereof, in which case notice may be served upon said Paige, as representing the attorneys for the plaintiff and the said receiver Reynolds, and such notice so served shall be deemed sufficient.

702 III. This stipulation is without prejudice to the rights of said petitioner and the rights of all parties herein.

Dated September 6, 1883.

McCLELLAN & BROWN,
Att'ys for Plaintiff.
By E. W. PAIGE, *Counsel.*
CAMPBELL & PAIGE,
102 *Broadway, New York, Att'ys for Receiver Reynolds.*
HALE & BULKELEY,
Attorneys for Petitioner.

Counsel for certificate-holders also offered in evidence the testimony of John W. Van Valkenburgh recalled, as follows:

JOHN W. VAN VALKENBURGH, recalled by Mr. Hale:

Q. You took possession of the Lebanon Springs railroad as receiver, did you not?

A. Yes, sir; I did.

Q. Do you remember the date of your taking possession of it?

A. I don't know that I can give the exact date here; it was in 1880; November.

Q. After your appointment in the People's suit?

A. Yes, sir; I think about the sixth of November.

Q. That would be before your appointment in the People's suit?

A. I was appointed by Judge Westbrook in both suits, but the one in the Sackett suit was first.

Q. You took possession soon after the appointment in the Sackett suit, and before you were appointed in the People's suit?

A. Yes, sir.

Q. You continued in possession under the appointment in the People's suit?

A. Yes, sir.

Q. In both suits?

A. Yes, sir.

Q. State in a general way what was the condition of the
703 road when you took possession first as receiver?

A. When I first took possession of the road it was on Monday; Saturday night and Sunday Mr. Root, who had been operating the road before I was appointed receiver, took everything off of the road as he told me by the order of Mr. Park.

(Mr. Jennings objects, and the court said he would allow the witness to show what Mr. Root did, but not what he said.)

The WITNESS: Saturday night he took off all the rolling stock, all the hand cars, tamping bars, scales out of the depots, benches,

and everything that was movable, almost, along all the road, leaving them entirely destitute of anything.

Q. That is, anything in the way of operating it?

A. Yes, sir.

Q. What was the condition of the track?

A. Well, the track was in very poor condition, and the ties were very rotten; it was unsafe to run over it with any kind of speed, and it was in such poor condition that I applied to the court and got the court to appoint Mr. Jones (whom I had never seen until that day of his coming here), to examine the road, and he made a report.

Q. After his report was made the order for the issuing of certificates was made?

A. Then I applied for the issuing of some certificates in order that I might build a turn-table at Petersburgh Junction, as they had prevented us from going into Vermont, and my only alternative was to build a turn-table there so we could operate the road in this State, as I was not receiver in Vermont. They placed me in that position so that in order to operate the road I had to get some money in some shape to build a turn-table to turn us around, and to get some cars and to get an engine; on that I applied to the court, to Judge Osborn, for $25,000 to issue $25,000 of receiver's certificates; I found, of course, on the road at Chatham, no place for engines or anything else, except at the mercy of the Har-
704 lem railroads; I had to provide for water and all these things; the road was in such shape that it was actually necessary, and I couldn't get along in any other way except by applying to the court to get some money so as to put it in running order.

Q. The order of the second of April, which authorized the issuing of $350,000 in certificates was made under those circumstances?

A. Yes, sir; with the $350,000 we paid the $25,000.

Q. Out of the avails of the $350,000, you paid the prior issue of $25,000?

A. Yes, sir.

Q. State generally how the residue of the money was expended; was it applied upon the railroad and upon liens which existed upon the railroad?

A. Yes, sir.

Q. Your accounts were examined before Judge Cadman?

A. Yes, sir; they were; it was expended upon the road and on cars, etc.

By Mr. PAIGE:

Q. What do you mean by "liens which existed upon the railroad"?

A. What I mean by that was liens that Judge Westbrook appointed Judge Strait upon.

Q. They were the Taylor, Tilden, Sackett, and other things in evidence?

A. Yes, sir; I think you have them all in evidence.

Also the testimony of William C. Van Alstyne, as follows:

WILLIAM C. VAN ALSTYNE, sworn, and testified:

Examined by Mr. HYDE:

Q. Mr. Van Alstyne, you have the letter book of the receiver Van Valkenburgh?

A. Yes, sir.

Q. Are you clerk of the receiver?

A. Yes, sir.

Q. In what other capacity were you there?

A. General manager of the road.

705 Q. Have you the letter-press book with you?

A. Yes, sir.

Q. Have you press copies of letters sent to bondholders by the receiver?

A. Yes, sir.

Q. Read the first one you find.

A. (Reading:)

"NOVEMBER 10, 1880.

R. C. Root, Esq., Bennington, Vt.

SIR: By virtue of an order of the supreme court of this State, appointing me receiver of the Lebanon Springs Railroad Company, I am required to prepare and file a statement of the bonds of the said railroad company, the amounts thereof, and who owns and holds the same. In discharge of that duty I herewith request you to forward to me at your earliest convenience a full and complete statement as above specified.

Yours truly,

J. W. VAN VALKENBURGH, *Receiver.*"

Q. Substantial copies of that were sent to whom as you find them in the book?

A. There were letters to John Bloodgood, Esq., New York; Trenor W. Park, Esq., New York; W. Butler Duncan, New York; William H. Vanderbilt, New York; Samuel J. Tilden, New York; Aaron J. Vanderpoel, New York.

Q. What was done after that?

A. After that the same letter was made into a circular, and those circulars were sent to various parties from time to time.

Q. Were they printed?

A. No, sir; they were hand-written circulars.

Q. Do you remember any of the parties, other than those to whom they were sent?

A. Yes, sir; one was sent to Augustus Schell and a relative of his, who lives at Rhinebeck; G. T. Bonner & Co., Cornelius Vanderbilt, E. V. W. Rossiter, and many others whose names I do not recall.

706 Q. Those several copies of the other letters were substantially the same as the first one?

A. Yes, exactly the same.

Also the admission from the printed case that William V. Reynolds, who was appointed receiver by order of the court to succeed John W. Van Valkenburgh was in possession of the road as such receiver at the time of the sale under the judgment in Sackett against Root, and that he delivered possession thereof to Messrs. Hazard and Foster or their grantees.

Also the decree of the United States circuit court in the case of The Central National Bank of Boston against Foster and Hazard and others being the same annexed to the answer of the Central National Bank above set forth.

This was objected to by plaintiffs' counsel and by Messrs. Jennings and Larocque as immaterial, but was received in evidence. It was also objected to by Mr. McCurdy upon the same grounds and further, that it was not binding and conclusive upon Foster and Hazard, and that although they were nominally parties defendant in that action, they were not the actual defendants in that action, the actual defendants being The New York, Rutland and Montreal Railway Company, the creditor upon whose behalf alone the action was defended. This objection was also overruled.

Counsel for said certificate-holders also offered in evidence the testimony of William V. Reynolds, as follows:

WILLIAM V. REYNOLDS, sworn, and testified.

Examined by Mr. HALE:

Q. You were the receiver appointed in the case of Sackett *vs.* Root in the place of Mr. Van Valkenburgh after his resignation?

A. Yes, sir.

707 Q. Will you state whether after the sale in that case to Messrs. Hazard and Foster you surrendered the possession of the road to them?

A. I did, sir.

Q. Then you ran the road as their agent, operated it as their agent for some time after the sale?

A. Yes, sir.

Q. Until the New York, Rutland & Montreal Railroad Company took possession?

A. Yes, sir.

By Mr. MCCURDY:

Q. After the New York, Rutland & Montreal Railroad Company got through running the road, did you then take possession again?

A. Yes, sir; I did.

Q. What moneys had the New York, Rutland and Montreal R. R. Company expended in the way of rolling stock or repairs of the road so far as you know?

A. I have no knowledge except that obtained from looking over the books.

Q. Did the books of the company come into your possession?

A. The books that conveyed that information; yes.

Q. There were some engines on the road which the New York, Rutland and Montreal R. R. Co. obtained; are they there now?

A. No, sir.

Q. Did they remain there after you came into possession of the road again?

A. Excuse me—there are two engines on that road that were there when I delivered the possession of the railroad to the New York, Rutland and Montreal Company.

Q. They were the ones that were there under you formerly?

A. Yes, sir; and they don't belong to anybody now; one of them belongs to me individually, and the other is claimed by the Massachusetts Mutual Life Insurance Company.

Q. There were some engines obtained by the New York, Rutland & Montreal Railroad Company?

A. Yes, sir.

708 Q. What became of them?

A. I don't know, sir, except——

Q. (Interrupting.) They didn't come into your possession?

A. No, sir.

Q. Did any rolling stock other than that which you once had in your possession before they took possession come into your possession afterwards?

A. No, sir.

Cross-examination by Mr. PAIGE:

Q. You have just said that you again took possession of the road after the New York, Rutland and Montreal Railroad Company has ceased to be in possession of it; that possession you took as receiver appointed in this action?

A. Yes, sir.

Q. Were you afterwards appointed receiver by the court of chancery in Vermont of the Vermont portion?

A. Yes, sir.

Q. In that proceeding was there exhibited to the court of chancery in Vermont a statement of the debts owing by the New York, Rutland and Montreal railroad to operatives and material-men?

A. There was no statement exhibited, but there was a statement made by counsel that there were such debts in existence.

Q. Which was used upon that application?

A. Yes, sir.

Q. Have you got that statement?

A. Yes, sir; the statement was not presented at that time, but a statement was made by counsel that there were debts in existence, and I have the statement made since then. (Producing same.)

Mr. HALE: We object to this paper.

(Mr. MCCURDY:)

Q. Does that statement which you now produce show the condition of the company just prior to the time you took possession?

A. It shows as far as the books that came into my possession show.

709 Q. The books of the New York, Rutland and Montreal Railroad Company?

A. Yes, sir.

Redirect examination by Mr. McCURDY:

Q. Since you became receiver of the road how much money have you expended on the road in the repairs to the road, building of bridges, and acquiring rolling stock, in addition to the earnings of the road during that period, the total sum?

A. $64,000, and I sold $23,000, but not as receiver——

By Mr. HYDE:

Q. Finish the answer.

A. I sold $23,000 of old iron.

Q. So it leaves a net of $41,000?

A. Yes, sir; there are debts to pay of $6,000 or $7,000 on that account.

(Mr. PAIGE:)

Q. Those are the only debts of your receivership, are they?

A. Those are all; they are no debts of the receiver.

Q. There are no debts of your receivership?

A. No, sir; except the current expenses of the month.

By Mr. McCURDY:

Q. Who furnished the money by which you made the improvements, this $41,000?

A. Mr. Foster.

(Mr. PAIGE:)

Q. One of the defendants in this action?

A. Yes, sir.

Q. Who is to pay the bill contracted of $6,000 or $7,000?

A. Mr. Foster.

Also the direct examination of William B. Duncan, as follows:

WILLIAM B. DUNCAN, sworn and testified.

Examined by Mr. LAROCQUE:

Q. You were formerly a member of the firm of Duncan, Sherman & Co.?

A. Yes, sir; I was.

710 Q. You were also a bondholder of the Lebanon Springs Co.?

A. I was.

Q. And of the Harlem Extension Railroad Company?

A. Yes, sir.

Q. You were present in court when Mr. Wilber and Mr. Ryder were examined as witnesses in this case?

A. Yes, sir.

Q. And heard their testimony?

A. I did.

Q. Did you ever have any interview with Mr. Wilber prior to the sale of the Lebanon Springs road under the decree in the Union Trust Company suit?

A. Yes, sir; I had two or three.

Q. Did you have an interview with him in your office the day before or shortly before the sale?

A. I think it was the day before.

Q. Will you state briefly, if you please, what took place in that interview?

A. Mr. Wilber asked what was purported to be done in reference to the sale about to take place up at Albany; I told him that I was going up there with the view of possibly buying the property—so much of it as was located in the State of New York; he asked me then if I was buying it on account of the parties interested in the railroad, and I told him no, I was buying it in my individual capacity if I bought it at all, or I should buy it without any understanding with anybody; he asked me if he might not leave his bonds with me and that I would treat with him as I would myself; I declined to receive them, stating that it was absolutely necessary that I should act on my own responsibility entirely; he then asked me whether I would not allow him to leave his bonds in my vault; I told him if he would put them in a sealed package and deposit them there I would give them the same safe keeping that I did anybody else's bonds, without responsibility as to their care or the contents of the package.

Q. Was any one with him upon that occasion?

A. I think there was another of the trustees, possibly Mr. Ryder; I don't recollect specially.

711 Q. With whom was the conversation carried on by you upon that occasion?

A. My conversation was entirely with Mr. Wilber.

Q. Did you, in the course of that conversation, in terms or in effect say to Mr. Wilber or Mr. Ryder that you would purchase the road on behalf of the bondholders if you purchased it?

A. No, sir; I did not.

Q. Did you use any words which were equivalent to any such statement?

A. No, sir.

Q. Did you have any other interview with Mr. Wilber in which any such conversation took place?

A. No, sir; never.

Q. Have you any recollection of any interview with Mr. Ryder when Mr. Wilber was not present?

A. No, sir; I have no recollection of it.

Q. Did you ever, at any time or place, say to Mr. Ryder if you bought that road you would buy it on behalf of the bondholders?

A. No, sir; I did not.

Q. Did you attend the sale in January, 1873?

A. Yes, sir.

Q. And the property was there struck off to James C. Hull for $100,000?

A. Yes, sir.

Q. How was the purchase-money paid?

A. By two checks, one for the fees of the referee, as I understood it, and the other for the balance of the purchase-money.

Q. Those checks were to the order, if I recollect right, of the referee?

A. Yes, sir.

Q. As to the check for the balance of the purchase-money, that check, I understand, remains still in the possession of the Union Trust Company?

A. Yes; I think it does.

Q. Was there any agreement between you and the trust company that it should not be presented or paid?

A. No, sir.

Q. Were you the holder of coupons to any extent of the Lebanon Springs Railroad mortgage at this time?

A. I was.

712 Q. To what extent?

A. $140,000.

Q. State whether or not the foreclosure was for interest or principal.

A. The foreclosure judgment directed the payment of interest first.

Q. And the coupons you held would have represented more than the purchase price?

A. Yes, sir.

Q. Your firm continued in active business and solvent until when?

A. July 27, 1875.

Q. Was that money subject to check during the whole of that period?

A. Yes; subject to the presentation of the check.

Q. Did you, in point of fact, undertake to represent anybody upon that sale before the sale took place?

A. No, sir; nobody but myself or Mr. Hull.

Q. Prior to this sale there had been a negotiation in reference to the formation of the New York, Boston and Montreal railroad?

A. Yes, sir; there had been.

Q. And the original plan contemplated an exchange of new bonds for old ones?

A. In substance, I believe.

Q. It contemplated the New York, Boston and Montreal acquiring the property free from any such lien?

A. Yes, sir.

Q. Was there any difficulty in carrying it out on account of the nature of the Lebanon Springs bonds?

A. Yes; it was found impossible.

Q. Some of the bonds were held by towns?

A. Yes, sir.

Q. That plan had to be modified in consequence of these difficulties?

A. It had to be abandoned.

Q. Thereupon it became necessary in your own interest to do something to protect yourself?

A. Mr. Park and myself determined to protect ourselves; I had very little to do with the previous plan.

Q. Subsequent to the purchase of that property by Mr. Hull a mortgage was executed by Hull and Lincoln, who had purchased the property in Vermont to yourself and Mr. Park?

A. Yes, sir.

713 Q. And the property, subject to that mortgage, was afterwards conveyed to the New York, Boston and Montreal Railroad Company?

A. Yes, sir.

Q. Under a contract which has not been fully performed?

A. Which has not been fully performed.

Q. In purchasing this property and taking this mortgage, although you say that you acted without any agreement or understanding with anybody to represent anybody except so far as you and Mr. Park were concerned, what was your intention with reference to any surplus that might remain after paying such equities as in your judgment had precedence of the ordinary bonds?

A. The intention as between Mr. Park and myself was (if the result of the sale was to be our acquisition of the property and its sale under the arrangement we made) to appropriate the proceeds to our own protection, to use our own discretion in paying those who were equitably entitled to moneys not secured by mortgage on the road previously existing, and subsequently if there was any surplus there to deal with all the holders of the bonds in the same manner that we would deal with the bonds that we ourselves individually held.

Q. Mr. Park was also a holder of bonds of both the Lebanon Springs and the Harlem Extension?

A. My recollection is about one million of dollars.

Counsel for certificate-holders then offered in evidence the testimony of John W. — Valkenburgh, as follows:

J. W. VAN VALKENBURGH, recalled.

Examined by Mr. PAIGE:

Q. Judge McClellan has testified that he is in possession of $100,000 of Lebanon Springs bonds, which he received from you; were those bonds deposited with him under written papers signed by him?

A. Yes, sir; receipts of Judge McClellan.

714 Q. Have you the receipts here?

A. Yes, sir (producing the same).

Q. Were they in this form which I read; I read the one to Mr. Brower:

"NEW YORK, *Oct.* 31, 1884.

Received of John W. Van Valkenburgh the following bonds of the Lebanon Springs Railroad Company, numbers as follows: 628, 631, 632, 634, 637, 671, 672, 680, 685, 683, each for $1,000, and the numbers 1275, 1276, 1277, 1278, 1279, each for $1,000, in all $15,000 par value, which I am to dispose of and account to him for the proceeds as we agree.

H. W. McCLELLAN."

A. Yes; that is a correct copy.

(Mr. Hale objects as immaterial and incompetent, in which Mr. McCurdy joins.)

Q. Were all the bonds which were given by you to Judge McClellan given to him under such similar agreements?

A. Yes, sir; in the same words.

Q. Give the names of the other bonds.

A. Mr. Melcher for $30,000; myself, $42,200; William H. ——, $10,000; L. G. Fisher, $10,000; J. Hendricks, $10,000; Ira Thorn, $5,000; F. E. Blanchard, $5,000, and one blank that I never took the number, for $100; $117,300 was the amount Judge McClellan had.

Q. Were they all delivered in 1884?

A. Yes, sir; except the $100 one.

Q. That was when?

A. March 7, 1885; the rest were all delivered to him between October 31, 1884, and December 27.

Q. These bonds all belonged to other persons?

A. Yes, except $42,900, which belonged to me, individually.

Q. The bonds of which you have given the names just now all belong to other persons?

A. Yes, sir; to the persons of those names.

715 Q. The agreement reads, as you will notice, "which I am to dispose of as we agree;" have you ever made any agreement with him as to how we shall dispose of them?

A. No, sir; no agreement with Judge McClellan.

Q. Did you ever make any agreement with anybody else?

A. Well, if the court was here I would ask him to allow me to tell why these receipts were placed in Judge McClellan's hands; these bonds were placed in his hands by direction and by request of Mr. McCurdy.

Q. What was the agreement with Mr. McCurdy, if any?

(Mr. Hale objects as immaterial; Mr. McCurdy also objects.)

Q. What was the agreement, if any?

A. The understanding was that I was to get for my bonds thirty cents.

Q. For all of the others also?

A. There was no agreement as to the others.

Q. None at all except the written paper?

A. That is all; we were to settle as we agreed.
Q. You never have agreed?
A. Only as to myself; I was to have thirty cents.
Q. As to the others you have not agreed with anybody?
A. No, sir.
Q. Neither with Judge McClellan nor anybody else?
A. No, sir.

By Mr. McCURDY:

Q. During all this litigation Judge McClellan represented those bonds in court?

(Mr. Paige objects that there is better evidence.)

A. No, sir; I think not.
Q. In the Sackett suit?
A. Yes, sir.

(Objected to that there is better evidence.)

By Mr. HALE:

Q. The full amount was how much of those bonds delivered to Judge McClellan on these receipts?
A. $117,300.
716 Q. And all except one bond of $100 was delivered in 1884?
A. Yes, sir.

(Mr. HALE:)

Q. Under those written receipts you have mentioned?
A. Yes, sir.

(Mr. HALE:)

Q. The written receipts do not cover the whole $117,300?
A. All but the one bond of $100.

Also the portion of the testimony of Frederick L. Westbrook which was not offered by plaintiff's counsel, as follows:

FREDERICK L. WESTBROOK recalled.

By Mr. STETSON:

Q. Upon or about the month of December, 1880, upon an application then pending before him in the suit of Sackett against Root, Mr. Justice Westbrook made an order denying the application of certain parties to come in, but stating that the parties had a right to receive notice, and that such notice might be served upon Frederick L. Westbrook; is that yourself?
A. It is.
Q. You are familiar with the circumstances under which that was formed?
A. I am.
Q. Will you state the circumstances?

A. I was counsel employed by Mr. John Bloodgood.

Q. Mr. John Bloodgood or M. H. Bloodgood?

A. John Bloodgood; I saw them both; M. H. Bloodgood is the brother, I infer; I do not recollect his name; about the 1st of October, 1880.

Q. Where did you see them?

A. By telegram, and saw them repeatedly afterwards.

Q. I was only asking you to start in right.

A. I was employed about the first of October.

Q. Have you that telegram?

A. I have not; I received several, but I have neither of them.

Q. Go on.

A. I think it was about the first of October, I don't remember the date, I received a telegram signed by John Bloodgood, whom I hadn't known or heard of before that I am aware of, asking me to appear on that day to oppose an application for a
717 receiver of the Lebanon Springs railroad; I did not receive it in time to appear; I was informed that some action had been taken; I don't of my own knowledge now say what it was, but I should judge from the testimony that I have heard that it was in reference to General Gates; I subsequently saw Mr. Bloodgood, I saw Mr. Bunnell, I saw Trenor W. Park and his son-in-law, General McCullough; I think that was on the fifteenth of October, and gave such opinion as I thought the circumstances of the case demanded; I presume you don't care to go into the details of that, but at the request of these gentlemen, two of these gentlemen——

Q. Which two?

A. Of Mr. Bunnell and Mr. Bloodgood; I remained in the city over night to meet Mr. Hurd, who was telegraphed to Bridgeport, I think it was, to meet me at the Sturtevant house the next morning; I fixed the date by the letter which I have from Mr. Bunnell.

Q. Have you that letter?

A. I have the letter.

Q. Please produce it? (Witness produced letter.)

Q. You may read it.

A. "Lyman B. Bunnell, attorney and counsellor at law, No. 170 Broadway, New York, October 15, 1880. Mr. Westbrook: Dear sir—I have telegraphed Mr. Hurd to meet us at Sturtevant house iomorrow morning at 9.30. Yours truly, L. B. Bunnell." The evening prior thereto Mr. Park had been telegraphed to meet me that same evening, the fifteenth, and I received a message he was confined to his room at the Buckingham, and requested me to call there, and I did so, and saw him and General McCullough together; we had an interview the next morning at the Sturtevant, and the result of it and the several consultations that I had subsequently with Mr. Bloodgood, Mr. Bunnell and Mr. McCullough was that an application was made to the court by Mr. Bunnell, on behalf
718 of certain stockholders, to be allowed to come in either as parties plaintiffs or defendants; Mr. McCullough, by an understanding between the three of us, made a separate applica-

tion; just what that is I do not know and can't tell until I see the papers.

Q. It has been put in here?

A. I presume so; now, if you will fix the date when that was returnable; was it the twenty-seventh of November?

Q. I will give you the exact date; it was returnable the twenty-seventh, and was then adjourned to December tenth?

A. That is it; I received from Mr. Bunnell a proposed copy order, which the judge was requested to make; I have that.

Q. Was that prior to the argument that you received it?

A. It is dated on the twenty-seventh of November; I have no distinct recollection independent of the date of the order when I received it.

Q. The twenty-seventh day of November was the return day?

A. Was the return day.

Q. Had any order been drawn by Mr. Bunnell before the decision of the judge was announced?

A. That, I say, I have no distinct independent recollection of the time when I received it.

By Mr. HARRIS:

Q. But you did receive the order?

A. I did receive the order.

Q. And before the argument?

Mr. STETSON: He said he had no recollection of the time.

The WITNESS: I say I have no independent recollection of it; my impression is that it was before.

By Mr. STETSON:

Q. Go on; read it if you wish.

719 At a special term of the supreme court of the State of New York, held at the court-house in the city of Kingston, in the county of Ulster, on the 27th day of November, 1880.

Present: Hon. T. R. Westbrook, justice.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

A petition having been presented to this court by certain of the owners and holders of the bonds of the Lebanon Springs Railroad Company, praying among other things that they may intervene in this action and become parties thereto; and it appearing upon the hearing of this application that F. L. Westbrook, Esq., was authorized to appear in this action in behalf of John Bloodgood, one of the said bondholders, and that the said John Bloodgood desired to become party coplaintiff herein; and it appearing further that L. B. Bunnell, Esq., was authorized to appear in this action in behalf of J. G. Mills and Abraham B. Baylis, other bondholders named in

said petition (the attorney for the petitioners asking leave to withdraw th- application in respect to the other bondholders named in the said petition) and that the said Mills and Baylis desired to become parties defendants herein; now, on reading and filing the annexed petition, with proof of due service hereof, after hearing F. L. Westbrook, Esq., of counsel for John Bloodgood, and L. B. Bunnell, Esq., of counsel for J. G. Mills and Abraham B. Baylis and —— ——, Esq., of counsel for the plaintiff, and on motion of L. B. Bunnell, attorney for the petitioners,

720 Ordered, that leave be and the same is hereby granted that in respect to all the bondholders named in the said petition, except John Bloodgood, J. G. Mills and Abraham B. Baylis, this application be and the same is hereby withdrawn.

It is further ordered, that the said John Bloodgood be, and he is hereby allowed to intervene in his own behalf in this action, and, further, that he be made party plaintiff herein. That the plaintiff's attorneys serve upon his attorney, F. L. Westbrook, copies of all pleadings and papers to the end that he may be advised of all proceedings taken or had in this action.

It is further ordered, that the said J. G. Mills and Abraham B. Baylis be made, and the plaintiff is hereby required to make them, parties defendant herein.

It is further ordered, that the plaintiff, within twenty days after the service of a copy of this order upon his attorneys, serve an amended summons and complaint in this action in which the said John Bloodgood shall be named as one of the plaintiffs, and the said J. G. Mills and Abraham B. Baylis shall be named as parties codefendants herein.

It is further ordered, that the said Mills and Baylis have and leave is hereby granted to them, to answer or demur to the said amended complaint, or make any motion in relation thereto within twenty days after the service of such amended pleading upon their attorney, L. B. Bunnell, as they may be advised.

A. The reasons that I have for the impression that it was before it, is first the date of it; second, that the name of the counsel appearing for the plaintiff is left blank, for afterwards the party appearing, counsel appearing would probably been put in; the further reason that the judge intimated, in fact, decided, upon the argument, that these parties could not come in as parties plaintiff.

721 Q. Have you any other reason for the belief that was prior to the argument?

A. I don't know of any other now.

Q. Have you any record or memorandum which will fix the time?

A. I have not. (Order marked "Exhibit No. 211, May 13, 1882.")

Q. Did you understand there ever was any application made to the court by which you were to be recognized as the sole representative of the parties?

A. An application made by either of the parties?

Q. Yes.

A. The application that was made—permit me to answer it in that way—was by the persons whom Mr. Bunnell represented, to be made parties; Mr. Bloodgood wasn't just that, and I don't recollect what it was; that was the application that was made to the court.

Q. Do you understand that an application was ever made to the court, or any suggestion made to the court, that you should be designated as the attorney upon whom notice should be served?

A. It was made to the court; it was made in pursuance of an understanding between those gentlemen and myself; who made it I don't remember.

Q. Who made it?

A. Think upon that day.

Q. Made upon that hearing?

A. I think so.

Q. What was the language used?

A. I don't remember.

Q. What was the substance of it?

A. The substance of it was that it had been stated in the argument—that is not the substance of the language, it is preliminary to it—it had been stated in the argument upon our side—that is, I mean Mr. Bunnell and myself—that there was charged, or at least there was opportunity for collusion between the parties to the suit who had agreed or stipulated for the appointment of this receiver, that such proceedings might be had as would jeopardize the interest of the bondholders who were not parties, and therefore it
722 would be eminently proper that some person representing those bondholders should have notice of all those proceedings, and the right to be heard in them all; that was stated as part of our argument.

Q. Was it suggested that you should be that person in reference to Mr. Bunnell, or Mr. McCullough?

A. So far as Mr. Bunnell or myself was concerned it was agreed; Mr. McCullough for a long time seemed to be in doubt what was the proper course for himself to take in behalf of Mr. Park and Mr. Duncan, and therefore he did not unite in our petition to permit the bondholders to be parties plaintiff or defendant; as I said before, I do not recollect exactly what his petition was.

Q. Do you mean to be understood as testifying that Mr. Bunnell united in the suggestion to the court that you and not he, or that you to the exclusion of himself, should be selected as the person?

A. It was understood and agreed between Mr. Bunnell and myself that I should be the person.

Q. Was that communicated to the court?

A. It was communicated to the court.

Q. By whom?

A. Whether by both of us, or by myself alone, I don't know.

Q. I was right in saying there was no such agreement between you and Mr. McCullough?

A. Yes, sir; Mr. McCullough was aware of it, and concurred in all that we did, but he did not act on the record with us.

Q. Were you acting in any way in Mr. McCullough's application?

A. In his application to the court?

Q. Yes.

A. No, sir.

Q. He appeared there and made his own application?

A. Yes, sir.

Q. Did not interfere with the other application?

A. He sent me that brief.

Q. Did he interfere with the other application?

723 A. Made an argument on behalf of the other bondholders?

Q. Yes.

A. I think not.

Q. Now, I would like to have you state with as much exactness as you can, the substance of this agreement between Mr. Bunnell and yourself?

A. That I should be designated as the person upon whom papers could be served and have the right to do what is incorporated in that order.

Q. How clear is your recollection on that point?

A. Quite clear.

Q. If Mr. Bunnell has testified directly to the contrary, your confidence in your recollection is not at all shaken by that fact?

A. Not at all.

Q. You were employed by John Bloodgood?

A. I was.

Q. As you have described, were you retained by him in the substantial manner of a payment of money to you?

A. Yes, sir; if you call that substantial, he paid me $125.

Q. That was to act for him and others interested with him, or for him alone?

A. He said it was on behalf of the bondholders, and accounted for the small sum he paid me by saying that the others should pay their proportion.

Q. What time was that originally made?

A. I can't tell; I should think it was the second or third interview I had with him; he gave me a check for it and that will show.

Q. Was it before the argument of the tenth of December?

A. I think it was, but I am not certain.

Q. Did you continue to act for him and the other bondholders interested with him, faithfully from that time on until the interview which you have described as having taken place after Mr. Jones, the expert, had made his report as to the condition of the road?

A. I acted steadily, and endeavored to act faithfully.

724 Q. Then he having refused to continue payments for that service longer, you advised him that you should not act any longer for him, and that you would send all papers served upon you to him by mail or express?

A. I told him that.

By Mr. PERRY:

Q. When was this agreement made between you and Mr. Bunnell that you be designated as the person upon whom notice and papers should be served?

A. I cannot fix the time or place; I can only say——

Q. Wait a minute there; you say your motion in this order of the judge, as the person upon whom papers should be served, was in pursuance of an agreement made between you and Mr. Bunnell?

A. I say so.

Q. I ask you when that agreement was made?

A. I say I cannot fix the time.

Q. When was it made in reference to the time when the application was argued?

A. It was made whenever the suggestion was made that some person should be so designated; whether that was on the argument or subsequent to it, or prior to it, I don't remember.

Q. Was Mr. Bunnell there after the argument?

A. At Kingston?

Q. Yes.

A. He was not that I recollect, but I saw him frequently in New York.

Q. It could not have been made after the argument, as I understand you; the suggestion was made to Judge Westbrook?

A. It must have been of course.

Q. When was that suggestion made?

A. That I don't remember.

Q. Did you hear any suggestion made to Judge Westbrook that you should be designated?

A. I know the suggestion was made, and I think it was made by this paper—this draft or proposed order—which I have read.

725 Q. This order of the twenty-seventh?

A. Yes, sir.

Q. I understand you to say you did not present that to the judge at all?

A. I don't think I said so; I said I didn't remember whether that was presented to him or not; what I mean to say now is, or did mean to say was, that the suggestion to the judge came from that order or proposed order; whether it was read by the judge, or whether I stated it to him, I don't remember.

Q. Let us see if you are not mistaken about this; you do not mean to have us understand an agreement of that kind was made between you and Mr. Bunnell before the hearing of this motion?

A. If I should have so wished you to understand I should have so stated; I said I did not remember.

Q. It could not have been very well until the hearing, and certainly you and Mr. Bunnell both supposed you would get the relief you asked?

A. I had doubts about it.

Q. Didn't Mr. Bunnell?

A. I don't know.

Q. I mean the application the persons you represented should be made either plaintiffs or defendants—that was the application?

A. That was the application.

Q. Do you mean to say neither of you expected to succeed?

A. I haven't said that.

Q. You said you did not?

A. I haven't said so; I said I had doubts about it; I often make applications to the court that I have great doubt about their being granted.

Q. You are unable to say whether the agreement between you and Mr. Bunnell was made before or after the argument of the application?

A. I am unable to say.

Q. If it was made afterwards it must have been made by you and Mr. Bunnell in New York?

A. Unless it was made the same day it must have been after the argument; it may have been made then.

726 Q. You are unable to state how that was?

A. I am unable to state.

Q. Can you state you did not make the suggestion to the judge that such an arrangement had been made between you and Mr. Bunnell?

A. I cannot say whether I did or not; if I did it was from the paper; made the suggestion from that paper.

Q. If you made such a suggestion as that, that was made after the argument; if you suggested to the judge that an agreement had been made between you and Mr. Bunnell that you should be designated as the person upon whom papers might be served, that must have been made after the argument?

A. If the suggestion was made to the judge after the argument, I made it; it may have been made during the hearing before him; I don't say when it was.

(This testimony was received subject to the objection that it was incompetent, immaterial and irrelevant.)

Also the admission that under the decree in the action of The Central National Bank against Foster, Hazard and others, the property that had been formerly of the Lebanon Springs Railroad Company was advertised for sale on the 19th day of May, 1889.

It was also admitted that under said decree the property described in the complaint in this action has since been advertised and is still advertised for sale under that decree.

It was admitted that the Central National Bank of Boston, and the other certificate-holders received the back interest on their certificates out of the $155,000 consideration paid by Foster and Hazard under the judgment in the Sackett suit.

It was also admitted that the payments of interest that had been made up to January 1, 1891, were made by the defendant, William Foster, Jr., but plaintiffs' counsel objected to this fact as immaterial.

(The objection was overruled.)

It was also admitted that defendant, Foster, has paid on
727 account of the principal of the certificates held by the Central National Bank of Boston, Peter Butler, as receiver of the Pacific National bank, and the Massachusetts Mutual Life Insurance Company, the sum of $65,000. (This was objected to by plaintiffs' counsel, but the objection was overruled.)

It was also admitted that the investigation known as the Ward & Westbrook investigation hereinbefore referred to, was made by a committee of the assembly from April 21, 1882, to May 25, 1882, and was a public hearing, and that the proceedings therein were published in and appeared from time to time in the leading newspapers of the State of New York.

Mr. Larocque on the part of the defendant, Shipman, offered in evidence a certified copy of the record of the assignment of Duncan, Sherman & Co., to William D. Shipman, dated July 27, 1875.

HUGH W. MCCLELLAN was then called as a witness by Mr. McCurdy, of counsel for defendants, Foster and Hazard and The American Loan and Trust Company, and testified as follows:

I reside in Chatham; I remember the time the Sackett suit was commenced, but do not know whether I can name the date; at that time I was a member of the firm of McClellan & Brown; our firm then appeared for Marvin Sackett; we commenced other actions about that time in connection with the Lebanon Springs railroad; we had two actions; one brought by Gardner Early, and the other by Horace Green; the paper produced is the complaint in the action of Horace Green against Trenor W. Park and William Butler Duncan, defendants, in the supreme court of this State. It is the complaint in the action in which the answer of the defendants, Park and Duncan, has already been put in evidence by the plaintiff in this case; the action was brought to obtain a release of the
728 defendants from a judgment by which they were adjudged to be the trustees for the bondholders of the Lebanon Springs Railroad Company; the receivers of the mortgage.

(Objected to by Mr. Larocque for defendants, Park and Duncan and Shipman, as irrelevant, incompetent and immaterial.)

Mr. McCurdy said he proposed to show by Judge McClellan that the action of Sackett against Root was only one of a series of actions brought by bondholders of the Lebanon Springs Railroad Company for the purpose of recovering for the bondholders; and that this action was merely supplemental to the action to recover the $877,000 mentioned, and that also by the opinion of the general term, the bondholders were entitled to it.

Mr. LAROCQUE: I understand the counsel to say that the papers are offered for the sole purpose of showing that in fact such actions were started and that the papers are offered in support of that fact, and for no other purpose.

Mr. MCCURDY: And to show that the action of Sackett against Root was not an individual action by Sackett.

(Mr. Larocque insisted on his objection and Mr. Jennings made the same objection.)

Mr. McCurdy then offered in evidence the complaint in the action in the supreme court of Gardner Early against Park and Duncan, brought by the same attorneys, McClellan & Brown.

The witness continues: This is the complaint in that action; the papers were served very soon after the verification of the complaint.

The same was offered in evidence for the purpose above stated. Objected to by Mr. Larocque and Mr. Jennings. Objection overruled and exceptions.

Witness proceeds: An answer was interposed in the action of Early against Park and Duncan. This is the answer.

(Offered in evidence. Objected to and received.)

729 Our firm appeared in that action and others also; Robert E. Andrews and a Vermont lawyer, Judge Denton; at the time of the commencement of the action of Sackett against Root, we represented other bondholders than Marvin Sackett; he was but a small bondholder; Sackett became the plaintiff at the request of the attorneys for the bondholders, and for no other reason; I did not conduct any of the proceedings before Strait, as referee; I did not, as attorney, have notice of these proceedings; I was not in any of them; I heard of them and they were conducted by others on behalf of claimants; not on my behalf; in the case of Green against Park an injunction was obtained which I suppose is still in existence.

EDWARD WINSLOW PAIGE, was then called by Mr. McCurdy and sworn as a witness, and testified as follows:

Certain printed papers were shown him and the witness stated that he thought he prepared the original of that paper, and that the corrections upon it in blue pencil were his handwriting.

That consists of proposed findings of fact and conclusions of law for a decree; it is a proposed decree in the case of Marvin Sackett against Root; I prepared it about the time that Mr. Reynolds was appointed receiver, which was, I think, about July, 1883; the decree was in accordance with the prayer of the amended complaint which I prepared; that didn't deviate from the original complaint so far as the then defendants in Sackett against Root were concerned, but it did so far as certain other defendants whom I proposed to bring in were concerned; it did not deviate very much in effect from the relief sought by the original complaint; I didn't intend to grant personal, individual and exclusive relief to Marvin Sackett; I didn't understand it to be a collusive action so far as I prepared it;

730 I supposed I was then acting for the plaintiff, but afterwards found I was not; I was acting for other parties, and I was informed that I was counsel for the plaintiff; I think you, Mr. McCurdy, so informed me.

The stipulation above set forth marked Exhibit A, defendants, was then shown to the witness, dated September 6, 1883.

Witness proceeded: This stipulation is signed in my handwriting, McClellan & Brown, attorneys for plaintiff, by E. W. Paige and Campbell and Paige, attorneys for Receiver Reynolds. It is also signed by Mr. Hale as attorney for the petitioners; in doing that, I supposed I was acting on behalf of the plaintiff; I did acts which I supposed were being done in behalf of the plaintiff; in these acts I acted in perfect good faith; I was not then acting collusively with anybody; I did not then know of any person acting collusively in that action, and have not since any information on that subject which I did not then possess, except the record. I know the plaintiff, Aaron R. Stevens; he lives in the city of Schenectady; not with me or on my property, and did not at the time the action was commenced; he was not a servant to me, or my ancestors; only a friend; he has property; I do not know what, besides these Lebanon Springs bonds; he is a man of responsibility; I did not ask or invite him to become the plaintiff in this action, but it was done, I suppose, in my name, not on my behalf; I don't deny that he consented to become plaintiff to oblige me; I knew that my name was used; at least, I was so informed, and I believed it; he was not the owner of any bonds of the Lebanon Springs railroad more than two months prior to the invitation extended to him; at the same time that the invitation was extended, to him, as I supposed, he was qualified by being furnished with bonds; Mr. Rogers, one of the plaintiffs,
lives, I suppose, in Hudson; all I know about his being pro-
731 cured to be a plaintiff in this case, is that an officer in one
of the banks at Hudson, I think the Farmers' bank, came to me in New York and asked me to take Mr. Rogers' case; he sent down the bond; he came first to see me and then sent down the bond with some letters; I kept the bond, and when the time came, I brought him in; I sent up an affidavit to this bank official to be made by Mr. Rogers, and when the affidavit came back I brought Mr. Rogers in; I had never by inquiry or by any advertisement requested plaintiffs of the description of Mr. Rogers; I never looked around for plaintiffs; I have said all that I know on this subject; I have never seen Mr. Rogers; have taken the statement of others that he is a bondholder; and his affidavit; Mrs. Wilbur resides, as I am informed, at Omaha; I received a letter from a person by the name of Wilbur, who is an officer of a bank at Omaha; I don't remember that he told me how he learned of the Lebanon Springs Railroad suit out there; the plaintiff, Mr. Douglas, I believe lives in Scranton, and I met him about the time this suit was begun; he was not originally a plaintiff; I didn't apply to him to be a plaintiff; he gave me the bonds, and I have them here; as to the plaintiff, Mrs. Harrison, I am informed by her husband that she resides in Brooklyn; I have never seen her; I don't know the business of her husband; he is in Chambers street; an officer of the safe deposit company on the corner of William street and Exchange place, came to me and said that he had a friend that had a lot of Lebanon

Springs Railroad bonds and asked me if I could do anything; I said yes, and he sent me Mr. Harrison; I don't know whether Mrs. Harrison bought these bonds, and when she bought them, except what Mr. Harrison told me, and the sworn complaint and affidavit which are here; I don't of my own knowledge know when or how any person who appears here as plaintiff other than Stevens, and for whom I am acting as attorney, acquired their bonds.

732 By Mr. HYDE:

I don't remember of handing to you in the year 1883 a copy of the findings which have been produced here, but I think it very likely; I do remember that you called at my office two or three times as representative of the Central National Bank of Boston, and talked with me about the Sackett suit, and about that time I had prepared the findings which have been produced here; I presume, very likely, I gave you a copy; the business of Mr. Stevens is, I think, that he tills the land and sells the produce; he is a market gardener; have known him all my life; at one time he rented land of us; that, I think, is the only way that he has been employed by me or any member of my family; he rented land from us for several years a good while ago; last, about the year 1872; I have been on terms of friendship with him all my life; have shared with him in sports, hunting and fishing, many years ago; have seen him from time to time, I suppose the idea of obtaining one of these bonds was suggested to him, and that my name was used; I don't suppose he would have done it if my name had not been used; he bought five or six bonds; I don't know whether he ever paid anything for them; I think very likely not; I don't of my own knowledge know of his obtaining the bonds.

By Mr. PAIGE:

It is a fact that I acted in the Sackett suit in the summer of 1883; the facts are as follows: I was informed that I was retained to perfect a scheme to clear up the title of the Lebanon Springs railroad and put it upon its legs, and as part of that information, I was informed that I would have control as counsel in the Sackett suit; I went to work in good faith; I prepared an amended complaint bringing in a quantity of other defendants, all of whom are
733 in the record of the case; I went so far in my belief that I could act in the Sackett suit as to obtain an order; I obtained the order upon signing the name of McClellan & Brown by myself as counsel; I prepared an amended complaint which I filed at the same time with the order in the clerk's office in Troy; with Mr. Jennings and Mr. Larocque we went over the proposed decree, the proposed judgment which Mr. McCurdy has tendered to me upon the stand, and I made out as well as I could to accommodate everybody; my information was that the certificates were to be bought at a certain price and the bonds paid off at a certain price and the road set on its legs; that summer I discovered upon a certain occasion that my authority to act was disavowed entirely, and I ceased to have anything to do with Sackett, and the order that I

had made and the amended complaint all went for nothing, for I discovered that I had no authority from the beginning.

MARVIN SACKETT was then called as a witness by Mr. McCurdy, and being sworn, testified, that he was the Marvin Sackett who was the plaintiff in the case of Sackett against Root; that at the time of the commencement of that action he was a bondholder of the Lebanon Springs railroad; he owned a part of the bonds a year or two; had in all about $8,000; did not become plaintiff in that action, or cause it to be done for my individual benefit; nor for the purpose of reaping to myself any personal advantage; my attorneys were McClellan & Brown; I gave them permission to employ whom they pleased; I told them if they thought of any one they wanted they were at liberty to get him in it; I intended to get the road for the benefit of the bondholders, of which I was merely one.

Q. Who asked you to become plaintiff in that action?

A. I got it in my own head.

734 MATTHEW HALE was then called by Mr. Paige and sworn as a witness, and testified as follows:

The paper Exhibit A defendants was shown to him and he said the paper was signed by him. I afterwards produced that paper in court; I cannot tell when; it was at Catskill upon a motion before Judge Osborn; I think upon a motion for leave to issue additional certificates, which I went down there to oppose; I may be mistaken about that; I think it was the first time that I produced it, shortly after it was given; I think Judge McClellan did in substance deny Mr. Paige's authority to act for the plaintiff; I think he said Mr. Paige had no authority to sign that stipulation.

By Mr. HYDE:

A petition had been served on the part of the Central National bank to become a party to the Sackett suit and notice of motion had been served on that petition; the petitioners were not admitted as parties to the suit; we waived our motion on this stipulation, which gives us a right to have notice of all proceedings; notice was always given in pursuance of that stipulation; when Judge McClellan denied the authority of Mr. Paige to make the stipulation, I asked him if he repudiated the stipulation and objected to my appearing, and he, in the presence of several counsel, said he did not, and while he insisted that Mr. Paige had no authority to sign it, he would not object. I appeared on that motion by authority of that stipulation; so far as I know, we had notice of all proceedings that subsequently took place in the Sackett suit.

The defendants, The Central National Bank of Boston, and the other certificate-holders, then offered in evidence the referee's deed, being a deed dated August 29, 1885, between George McClellan, as referee in the Sackett suit, of the first part, and William
735 Foster, Jr., and Rowland N. Hazard, of the second part, reciting the judgment in the Sackett suit and the sale of the

premises described in said judgment for the sum of $155,000 to the parties of the second part, and the confirmation of the referee's report of sale, and conveying to the said parties the property and franchises described in the judgment in the Sackett suit.

This deed was objected to by plaintiff as immaterial and irrelevant. The objection was overruled and the same was received in evidence.

Mr. McCurdy then made a statement which was received as evidence that neither defendants Foster or Hazard owned or possessed any Lebanon Springs bonds up to and including the date of the judgment entered in this action on Judge Mayham's decision.

Mr. Hale stated, and it was taken as evidence, that the stockholders of the Pacific National Bank of Boston were responsible for the debts of the bank to an amount equal to the par value of their stock, and that any valid claim for that amount for which they were responsible could be collected from them.

The evidence here closed.

It was afterwards stipulated in writing by and between the attorneys for the various parties that the pleadings in the suit of The Central National Bank of Boston against Rowland N. Hazard and others, brought in this court and transferred to the United States circuit court, and also the report of the special master in said suit, date- February 7, 1888, be considered as in evidence in this case the same as if they had been offered on the trial by the certificate-holder defendants, subject to any objections to be specified that might then have been made thereto had they been then offered, and that the counsel for said certificate-holders might furnish to the judge copies of such pleadings and report.

In pursuance of said stipulation the counsel for the Central National Bank of Boston and other certificate-holders produced
736 to the judge and put in evidence, the pleadings in the said suit and the said report of the special master, as follows:

Supreme Court.

Trial desired in Rensselaer county.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated, Plaintiff,
against
ROWLAND N. HAZARD, WILLIAM FOSTER, JR., THE NEW YORK, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer,

judgment will be taken against you by default, for the relief demanded in the complaint.

Dated April 9, 1886.

HALE & BULKELEY,
Plaintiff's Attorneys.

Office and post-office address, 25 North Pearl street, Albany, N. Y.

737 Supreme Court, County of Rensselaer.

THE CENTRAL NATIONAL BANK OF BOSTON, which Sues as Well for Itself as for All Others Similarly Situated,
against
ROWLAND N. HAZARD, WILLIAM FOSTER, JR., THE NEW YORK, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

The complaint of the above-named plaintiff respectfully shows:

I. That the plaintiff is a banking association duly organized and incorporated under the laws of the United States, located and doing business in the city of Boston, in the Commonwealth of Massachusetts.

II. Plaintiff alleges, upon information and belief, that on or about the 2d day of April, 1881, in an action in this court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, upon the petition of one John W. Van Valkenburgh, who had theretofore been appointed in said action as receiver of the Lebanon Springs Railroad Company, an order was duly made at a special term of this court, bearing date the said 2d day of April, 1881, and duly entered in the office of the clerk of the county of Rensselaer, whereby the said John W. Van Valkenburgh, as receiver as aforesaid, was authorized and directed to issue, under his hand, receiver's certificate of indebtedness dated April 2,
738 1881, with interest at six per cent., of five hundred dollars each payable in five years, with interest coupons thereto attached payable on the first day of January and July in each year, in the aggregate amount of three hundred and fifty thousand dollars. Said certificates to be signed by said Van Valkenburgh as such receiver, consecutively numbered from one to seven hundred, inclusive, and a certificate on each thereof duly signed by one of the officers of the Farmers' Loan and Trust Company of New York city; that said certificates are of the series included in the numbers and amount aforesaid; that said certificates and the interest coupons thereto attached be made payable at said Farmers' Loan and Trust Company in said city of New York. And whereby it was further ordered that said receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon, pay and discharge certain previous certificates theretofore authorized by order of this court, and from the moneys arising from said certificates the said receiver was also empowered and directed by said order to purchase all necessary materials for the repairs of said

railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found to be due to claimants by the referee in said order named; and by said order it was further provided, directed and decreed, that said receiver's certificate of indebtedness, to the amount therein directed to be issued, be and the same were thereby declared to be a debt of the receiver incurred for the benefit and protection of the said Lebanon Springs railroad, and its owners and bondholders thereof, and said certificates to the said amount of three hundred and fifty thousand dollars were, by said order, declared and decreed to be a first lien on said railroad
739 bed, tracks, ties, trestles, bridges, culverts, engines, cars, depots, and all and every kind of property, either owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any reorganization of the company, or in its consolidation with any other company, and that in case of any sale of the said railroad, the property in the hands of the receiver and franchises under any decree of the supreme court, said certificates were to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and canceled by him from the earnings of said railroad. But it was further provided in said order that in case the said railroad property in the hands of the receiver, and franchises on any sale thereof, should not bring sufficient to pay the full amount of principal and interest then due on the outstanding negotiated certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver and franchises should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid, with interest thereon, as by reference to said original order, or the record thereof, as entered in the county of Rensselaer, will more fully appear.

III. And plaintiff further alleges, upon information and belief, that the said John W. Van Valkenburgh as receiver as aforesaid, under and in pursuance of said order, did duly issue and negotiate certificates of indebtedness in the manner and form by said order provided, to the said amount of three hundred and fifty thousand dollars. And that he duly applied the moneys received from the said certificates to the uses and purposes in the said order mentioned and authorized.

740 IV. And the plaintiff further alleges that it is now, and has for several years last past been, the holder and owner of said certificates, amounting in the aggregate to two hundred and fifty thousand dollars of principal thereof.

V. And the plaintiff further alleges, upon information and belief, that the certificates of indebtedness issued and negotiated by said receiver, which are not held by this plaintiff, are held by divers persons and corporations, many of whose names are unknown to this plaintiff.

VI. And the plaintiff further says, upon information and belief, that in the said above-entitled action, wherein Marvin Sackett was

plaintiff and Russell C. Root and others were defendants, upon the trial of the issues therein this plaintiff appeared by its attorneys and counsel and made proof in regard to the issuing of said receiver's certificates and its title thereto, and that such proceedings were had in said action that on or about the 12th day of January, 1885, a judgment was duly rendered therein by which it was, among other things, adjudged and decreed that the said certificates of indebtedness, issued by the said John W. Van Valkenburgh as receiver as aforesaid, under and by virtue of the above-mentioned order, amounting in the aggregate to three hundred and fifty thousand dollars, were ratified and confirmed and declared to be a first lien on the said railroad and its property, as provided in and by the said above-mentioned order, and as stated in said certificates, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in the said judgment provided for; and whereby it was further adjudged and decreed that the property, franchises and rights of the Lebanon Springs Railroad Company, as described in and enumerated in a certain mortgage made by said company to the
741 Union Trust Company of New York, and as in the said judgment particularly described and set forth, and all the right, title and interest of any and of all the parties to said action therein and thereto, including all property and assets in the hands of the receiver in said action appertaining thereto, wherever the same might be, be sold at public auction in the county of Rensselaer by George McClellan, Esq., of Chatham, Columbia county, New York, referee, appointed in and by said judgment to make such sale for the benefit of the first-mortgage bondholders of the said railroad company issued July 1, 1867, for the amount of two millions of dollars, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and that said purchaser or purchasers should assume, as part of the consideration of the said purchase, the payment thereof as above stated, and that from the avails of said sale, after the payment of certain other expenses therein provided for, the said referee pay the amount of interest due on said receiver's certificates, as by reference to the said judgment, which was duly entered in the office of the clerk of the county of Rensselaer, will more fully appear.

VII. That under and in pursuance of said judgment the said George McClellan, the referee therein named, did duly advertise for sale on the 12th day of June, 1885, and did sell at public auction the premises, rights, franchises and property in the said judgment mentioned and described, and the above-named defendants, William Foster, Jr., and Rowland N. Hazard, became the purchasers
742 thereof for the price or sum of one hundred and fifty-five thousand dollars, that being the highest sum bid therefor; and the said defendant William Foster, Jr., acting on behalf of him-

self and the said defendant, Rowland N. Hazard, did then and there, by his duly authorized attorney, pay to said referee five per cent. of said purchase price, and did, by said attorney, subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did, for himself and said Hazard, assume and agree to pay the amount of unpaid principal and interest on said certificate of indebtedness, as part of the consideration of such purchase. And the balance of said sum of one hundred and fifty-five thousand dollars was thereafter, as plaintiff is informed and believes, paid by the said purchasers to the said referee, and the said referee did thereafter duly execute and deliver to the said defendants, William Foster, Jr., and Rowland N. Hazard, a deed of the said premises and property in said judgment described. And the said referee paid from said sum of one hundred and fifty-five thousand dollars the interest then due on said certificates, amounting to about sixty thousand dollars.

VIII. That the said referee's deed above mentioned was, as this plaintiff is informed and believes, accepted by said defendants, William Foster, Jr., and Rowland N. Hazard, and was by them delivered to the clerk of the county of Rensselaer for record, and was duly recorded in the office of the said clerk of Rensselaer county, in Book 212 of Deeds, page 406. That in and by the said deed the grantee therein, the said defendants, Hazard and Foster, took said premises and property subject to the said unpaid principal and interest on the said receiver's certificates, as required by the said judgment as aforesaid.

IX. And plaintiff further says that the principal of said
743 certificates, with interest from the 1st day of January, 1886, became due and payable upon the 2d day of April, 1886. That on that day the said certificates, amounting to two hundred and fifty thousand dollars, held by this plaintiff as aforesaid, were duly presented to the Farmers' Loan and Trust Company of the City of New York, where the same were payable, and payment thereof was demanded, but the same was refused, and the whole of the said principal, with interest from the 1st day of January, 1886, is now due and unpaid.

X. That the said railroad premises mentioned in the said judgment and in the said referee's deed are described as follows: The following is a description of said premises and property as contained in the mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, the interest of the parties to this action and of the bondholders of the said Lebanon Springs Railroad Company, in which it is directed to be sold:

"All the right, title and interest of the said party of the first part (said railroad company) of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part, from the Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all lands thereafter to be acquired for the purpose of forming said tract or roadway; also, the railroad of the said party of the first part, now built and to be built,

and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part, connected with said railway or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock,
744 locomotives, tenders, snow-ploughs and scrapers and all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part, all of which chattels are declared to be fixtures and appurtenances to said railroad and are to be and be sold therewith and not separate therefrom and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part, of, in and to the franchise and equipment of the said Vermont and New York railroad belonging or in anywise appertaining, or which may at any time belong or appertain to the same as well in law as in equity."

XI. That, as plaintiff is informed and believes, the defendants, or one or some of them, are now in possession of the premises and property above described and are using and operating the same for railroad purposes, and that all the said defendants have, or claim to have, some interest in or a lien upon the said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said certificates.

XII. That there is now justly due this plaintiff, upon the said certificates held by it, the said sum of two hundred and fifty thousand dollars, with interest thereon from the 1st day of January, 1886.

Wherefore, the plaintiff prays that the unpaid principal
745 and interest of said receiver's certificates may be adjudged to be a lien upon the above-described premises in the hands of the purchasers thereof, and of any persons claiming through or under the purchasers at said referee's sale, and that the defendants and all persons claiming under them, or either of them, subsequent to the commencement of this action, may be barred and foreclosed of all right, claim or lien and equity of redemption in the said premises; that a receiver of the said premises, to receive the rents and profits thereof pending this suit for the benefit of the plaintiff and the other holders of said certificates, may be appointed by order of this court; that the said premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff and to the other holders of said certificates for principal and interest and costs, and

which may be sold separately without material injury to the parties interested, may be decreed to be sold according to law; that out of the moneys arising from the sale thereof, the plaintiff and other holders of said certificates, who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates, with interest to the time of such payment, and the costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants, Rowland N. Hazard and William Foster, Jr., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto, and that the plaintiff, in behalf of itself and the other certificate-holders as aforesaid, may have such further or other relief in the premises as shall seem to the court just and equitable.

HALE & BULKELEY,
Plaintiff's Attorneys, 25 North Pearl Street, Albany, N. Y.

746 STATE OF NEW YORK, } ss:
City and County of Albany, }

Henry D. Hyde, being duly sworn, deposes and says that he is one of the directors of the plaintiff in this action, that he had read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matter therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY D. HYDE.

Sworn to before me this 9th day of April, 1886.

WM. JOHNSON,
Notary Public, Albany County, N. Y.

N. Y. Supreme Court, County of Rensselaer.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated, Plaintiff,
against
ROWLAND N. HAZARD, WILLIAM FOSTER, JR., and THE NEW York, Rutland and Montreal Railroad Company, and The American Loan and Trust Company of New York, Defendants.

The defendants, Rowland N. Hazard and William Foster, Jr., for their separate answer to the plaintiff's complaint herein:

747 I. Deny any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the complaint marked respectively I, II, III, IV and V.

II. And answering the paragraph or subdivision of the plaintiff's complaint marked VI, the defendants admit and aver that, upon the trial of said action, wherein Marvin Sackett was plaintiff and Russell C. Root and other- defendants, this plaintiff appeared by its

attorneys and counsel and made some proof in regard to the said receiver's certificates, and that the judgment, which was duly rendered in said last-mentioned action, among other things, provided that the property and franchise of the Lebanon Springs Railroad Company, as enumerated and described in the mortgage made by said company to the Union Trust Company, be sold at public auction in the county of Rensselaer, by George McClellan, Esq., referee, Columbia county, the referee appointed in and by said judgment to make such sale; but these defendants deny any knowledge or information thereof sufficient to form a belief as to the other allegations contained in the said paragraph or subdivision of the complaint marked VI.

III. And answering the paragraph or subdivision of the complaint marked VII, these defendants admit that, in pursuance to said judgment, the said George McClellan, as such referee, did duly advertise the said property and franchise of the Lebanon Springs Railroad Company for sale, on or about the 28th June, 1885, and did subsequently sell the same at public auction to these defendants, who became the purchasers thereof for the price of $155,000, and that these defendants did then there, by their duly authorized attorney, subscribe to a certain contract of sale, which was
748 also signed by said referee; but these defendants expressly deny that the contents of said contract are correctly set forth in the plaintiff's complaint herein, and that they did, by said contract or otherwise, assume and agree to pay to the plaintiff the amount of unpaid principal and interest on the receiver's certificates held by this plaintiff.

IV. And answering the paragraph or subdivision of the complaint marked VIII, the defendants admit the same.

V. And answering the paragraph or subdivision of the complaint marked IX, the defendants deny any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained.

VI. And answering the paragraph or subdivision of the complaint marked X, these defendants aver, upon information and belief, that the description therein contained of the premises conveyed by the referee's deed is correct.

VII. And further answering, these defendants deny each and every allegations of the complaint not hereinbefore expressly admitted or denied.

VIII. And for a separate and distinct answer to the plaintiff's complaint herein, these defendants aver that they acquired the said property mentioned in the plaintiff's complaint, with notice that the receiver's certificates were outstanding and of the sum justly due therefor; and these defendants have ever since been and now are ready and willing to pay the sum justly due on account of the said receiver's certificates to the persons lawfully entitled thereto, but these defendants are advised and believe that this plaintiff is not entitled to receive payment thereof. That when the said
749 property came into the hands of these defendants, as aforesaid, it was subject to a lien for the amount actually due from

the said receiver, Van Valkenburgh, and his successor, in the trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants, when they acquired the aforesaid estate and property, succeeded to all the rights of the prior owners of said property as well as to their obligations; and that in case it be held that the lien against said property is enforceable in this action against the property after the discharge of the receiver, that then these defendants ought to be permitted to assert the rights and equities of those with whom these defendants are privy in estate.

That, in accepting the deed of the premises aforesaid, these defendants intended only to obligate themselves to pay the amount actually due the receiver on account of said certificates, with proper interest, and no other or greater sum by way of profit, and these defendants aver that they incurred no greater or other obligation in the premises.

Wherefore, these defendants ask judgment that the complaint be either dismissed, with costs, or that an accounting be had in the premises to determine what, if any, liens are on the property aforesaid, and in whose favor, so that the defendants may be fully assured and protected for any payments for or on account of said receiver's certificates.

VANDERPOEL, GREEN & CUMING,
Attorneys for Defendants Hazard & Foster,
No. 2 Wall Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Rowland N. Hazard and William Foster, Jr., being severally duly sworn, each for himself, says that he is one of the defendants herein; that he has read the foregoing answer and that the same is
750 true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

R. N. HAZARD.
WM. FOSTER, JR.

Sworn to before me this 7th day of June, 1886.

F. SPECHT,
Notary Public, Kings and New York Counties, N. Y.

Supreme Court.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated, Plaintiff,
against
THE NEW YORK, RUTLAND AND MONTREAL RAILWAY COMPANY, Impleaded with Others, Defendant.

The New York, Rutland and Montreal Railway Company, by Robert Ludlow Fowler, its attorney, makes answer to the complaint herein as follows:

I. It denies any knowledge sufficient to form a belief concerning the allegations contained in paragraphs numbered I and II of the complaint, excepting that it admits that, by a certain order of the said supreme court, John W. Van Valkenburgh was duly authorized and empowered to issue and emit receiver's certificates in the aggregate amount of $350,000, but for greater certainty this defendant asks leave to refer on the trial hereof to the original of the order in question, and to the terms, limitations and conditions of such order and emission.

751 II. This defendant denies the allegations contained in paragraphs III and IV of the complaint, excepting as hereinbefore qualified and controverted.

III. This defendant alleges that in respect of the certificates referred to in paragraph V of the complaint, the holders thereof do not and cannot unite with plaintiff in this action, nor are they represented by plaintiff bank, nor has plaintiff bank any power or authority to represent such holders in this action, but it sues for itself alone.

IV. This defendant further answering, saith that in respect of the action referred to in paragraph VI of the complaint, it is informed and believes that plaintiff was not bound by any decree therein as it was not a party thereto, and no proofs were ever taken therein in any way affecting or determining plaintiff's rights against the property or fund referred to in the complaint.

Defendant admits that by such decree certain certificates issued by John W. Van Valkenburgh, receiver, were declared to be, as hereinafter alleged, a first lien on the railroad and property referred to in the complaint herein. But defendant denies any knowledge sufficient to form a belief whether the certificates now claimed to be held by this plaintiff are any portion of such certificates so declared to be a lien, as aforesaid, or whether such declaration constitutes a valid and subsisting lien in favor of this plaintiff bank, enforceable in this action against this defendant or its property.

V. This defendant further answering, admits the allegations of the complaint contained in paragraph VII of the complaint, excepting that defendant denies that defendants Hazard and Foster ever agreed to pay in excess of the $155,000 (actually paid by them) more than was justly due by the receiver aforesaid on his cer-

752 tificates, nor did said Hazard and Foster acquire the property described in the complaint, subject to a lien for a sum greater than that justly due and owing to the *bona fide* first takers of the receiver's certificates aforesaid, and this defendant alleges that the amount justly due by such receiver on such certificates has never been ascertained by any judicial inquiry, binding on any person soever, and particularly this defendant. Nor has it ever been ascertained who were the *bona fide* first takers for value of such receiver's certificates.

VI. And this defendant further answering, admits the allegations contained in paragraph VIII of the complaint, except that it denies that by the terms of the conveyance the defendants Foster and Hazard, or either of them, took the property referred to in the com-

plaint subject to a lien for a sum greater than that justly due by the receiver aforesaid to the original and *bona fide* holders of the certificates issued and emitted by him.

VII. This defendant denies the allegations contained in paragraph XII of the complaint.

VIII. And for a further and separate defense to the complaint, this defendant alleges upon its information and belief that heretofore, to wit, on the 2d day of April, 1881, in an action in the supreme court of the State of New York, in which Marvin Sackett, on behalf of himself and all others similarly situated, was plaintiff, and Russell C. Root and others were defendants, the said supreme court authorized one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, to issue and emit receiver's certificates amounting in the aggregate to the par value of $350,000, and bearing interest at and after the rate of six per cent. per annum, but said Van Valkenburgh was ordered by said court to nego-
753 tiate said certificates for par, and not otherwise as by a limitation contained on the face of the said order, this defendant believes and charges, does appear.

That said Van Valkenburgh, receiver, in violation of the terms of the said order, issued 500 of said certificates, of the par value of $500 each, to one Edward Crane, as his agent, and without any consideration. And said Crane then pledged or hypothecated such 500 certificates with the Pacific National Bank of Boston, to secure a loan made by such Pacific National bank to said Crane. That subsequently said Crane is said to have paid over to said receiver a portion of the sums thus realized by him, but said property described in the complaint became liable, by reason thereof, only for the sums actually so received by its receiver in the aggregate, a sum greatly less than the face of said certificates.

And defendant further shows and alleges, that these said certificates so issued to Crane, as aforesaid, may be those now claimed to have passed to this plaintiff, at or about the time when said Pacific National bank became grossly insolvent. And this defendant alleges that if they have so passed to the plaintiff bank, it is as collateral for some debt or claim due to such plaintiff by said insolvent Pacific National bank, or by said Crane, or by some other intermediary, and not for value then or ever paid by the plaintiff bank; and so it is the plaintiffs can, in any event, have no rights in respect thereof superior to those of said Pacific National bank, or the said Crane, or the first holder thereof.

And defendant alleges, that such certificates, by the law in that behalf made and provided, were not negotiable nor assignable, excepting subject to all equities and to the extent of the amount actually due by the said receiver to said first holder, or to said Pacific National bank, or to said Crane, and if any of such
754 certificates passed to the plaintiff they so passed subject to all the equities existing in favor of said receiver, whatever they may have been. And this defendant admits, that all said certificates issued by said receiver were a charge on all the property in the hands of said receiver, of the amount actually paid for such

certificates or advanced thereon by the said first holder; with lawful interest at six per cent. on the sums so advanced from the date of the advance, but for no more than the said sum so paid, with proper interest thereon.

That subsequent to such emission aforesaid, said Van Valkenburgh was discharged from his said receivership and was succeeded by one William V. Reynolds, who acquired said property subject to the lien of the said receiver's certificates as aforesaid. That subsequently thereto such proceedings were had, that the said property described in the complaint in the said action of Sackett against Root and others was regularly brought to a judicial sale by virtue of a judgment and decree of said supreme court in said action made and entered, and it was then purchased in by the defendants Hazard and Foster.

That subsequent thereto the said Hazard and Foster conveyed and transferred all the said property and franchises precisely as conveyed to them by George McClellan, Esquire (a referee thereunto duly empowered), to this answering defendant, subject, however, to the payment of the sum justly due by said receivers but subject to no greater sum than that due by said receivers to the first holder or holders of the said certificates.

That this defendant so acquired the said property with notice of the said receiver's certificates outstanding and of all the premises relating to the sums justly due by the said receivers, and defendant has ever since been and now is ready and willing to pay the sums justly due by the said receivers to the persons lawfully there-
755 unto entitled, but this defendant is advised and charges, that this plaintiff is not entitled to receive payment thereof whoever else may be.

That as this answering defendant is advised, believes and, therefore, charges, the said property coming into the hands of this defendant as aforesaid is subject to a lien for the amount actually due from the said receiver, Van Valkenburgh, or his successor in the trust on such receiver's certificates but for no other or greater amount, and that this defendant, when it acquired the aforesaid estate and property, succeeded to all the rights of the prior owners of said property, as well as to their obligations, and that in case it be held that a lien against said property be enforceable by this action against the property after the discharge of such receivers, that then this defendant ought to be permitted to assert the rights and equities of those with whom this defendant is privy in estate.

And for further answer this defendant avers, that in accepting the deed of the premises aforesaid from Hazard and Foster, this defendant intended only to pay the amount actually due from the receiver on the said certificates proper interest, and no greater or other sums by way of profit, and said Hazard and Foster incurred no greater obligation in the premises.

That this defendant acquired said property subject to no greater lien in favor of any holder of receiver's certificates than existed against the property in the hands of the receiver, and that amount, when fixed and determined judicially in favor of a definite person,

this defendant stands ready and offers to pay to the persons so justly and legally entitled.

That the defendant has since its purchase aforesaid, expended large sums of money in betterments of the property so purchased, and is daily improving the same and increasing its value.

756 That all the receipts in excess of actual running expenses, are also being applied in good faith to betterments and improvements on the said railway, and the said property is now worth very much more then when defendants acquired it, and contracts are outstanding and being executed whereby much more will be expended by defendant on said property within the next four calendar months.

Wherefore, this defendants ask- judgment that the complaint be either dismissed with costs or else that an accounting be had in the premises to determine what amounts are a lien on the property aforesaid and in whose favor, so that the defendant may be fully assured and protected in any payments for account of its shareholders or other persons in interest.

ROBERT LUDLOW FOWLER,
Defendant's Attorney, 6 Wall Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Francis A. White, being duly sworn, says that he is the president of The New York, Rutland and Montreal Railway Company, the defendant above named; that he has read the foregoing answer and known the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANCIS A. WHITE.

Sworn to before ne this 18th day of May, 1886.

CHARLES JANLE,
Commissioner of Deeds, New York County.

757 Supreme Court.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues, etc.,
against
THE AMERICAN LOAN AND TRUST COMPANY, Impleaded with ROWLAND N. HAZARD and Others.

The defendant, The American Loan and Trust Company, appearing in this action by Blair & Rudd, its attorneys, answers the plaintiff's complaint as follows:

First. This defendant avers, upon information and belief, that subsequently to the sale of the railroad described in the complaint to the defendants, William Foster, Jr., and Rowland N. Hazard, as in the complaint alleged, the said Foster and Hazard duly sold and

conveyed the said railroad to the defendant, The New York, Rutland and Montreal Railway Company, which entered into possession thereof and has continued in such possession.

Second. That thereafter, and in or about the month of July, 1885, the said defendant, The New York, Rutland and Montreal Railway Company, duly executed and delivered to this defendant, as trustee, a certain indenture of mortgage or deed of trust, whereby, for the purpose of securing the payment of the principal and interest of certain bonds in said mortgage or deed of trust described, it granted, bargained, sold and conveyed to this defendant, as trustee, be-
758 sides other property, the said railroad mentioned and described in the complaint herein, in trust for the equal *pro rata* use, benefit and security of all persons and corporations that should at any time become or be the lawful owners or holders of any of said bonds, and this defendant accepted the said mortgage or deed of trust and undertook to perform the trust created thereby.

Third. That thereafter, and before the commencement of this action, as the defendant is informed and believes, bonds secured by said mortgage or deed of trust, or intended so to be, to the amount of $1,400,000 or thereabouts had been actually and in good faith issued and negotiated, which bonds are, as this defendant is informed and believes, now held by *bona fide* purchasers thereof.

Fourth. That the holders of a large majority of said bonds have requested this defendant to appear in this action in the interest of all the holders of said bonds, and as their trustee, to claim and demand the right, as a junior lienor to be subrogated to the rights of the holders of all of the now outstanding receiver's certificates mentioned in the complaint herein, upon such terms as to this court shall seem meet and just, and have promised and agreed to provide and furnish to this defendant, upon demand, the means with which to pay such sum or sums of money as this court shall decree to be paid to the holder or holders of said receiver's certificates.

Fifth. That this defendant has no knowledge nor information sufficient to form a belief as to, nor any sources of information from which it can ascertain, the amount of the said receiver's certificates now outstanding, in the hands of the plaintiff, and the other parties in whose behalf this suit is brought, or in the hands of any of
759 them, or the amount of the principal and interest now due thereon, and is therefore unable to make a tender to the plaintiffs and such other holders of said certificates, of the several sums which they may severally be entitled to receive thereon; and this defendant is advised and believes that it is entitled to ask that the said sums may be determined by the judgment and decree of this court, to the end that this defendant, on behalf of the said holders of said bonds, may have an opportunity to pay to the plaintiffs and the holders of said certificates the sums severally due thereon, and to be subrogated to their rights under said certificates.

Wherefore, this defendant prays that the several amounts due to the plaintiffs and the other holders of the receiver's certificates mentioned in the complaint, may be ascertained, determined and established by the decree of this court, and that this defendant may have

an opportunity to pay the several sums so ascertained and established, and that the plaintiffs and such other holders may be decreed and directed upon receiving payment as aforesaid to transfer and deliver all of the said certificates so held by them as aforesaid to this defendant, and that this defendant may have such other or further relief in the premises as to the court shall seem meet.

BLAIR & RUDD,
Attorneys for Defendant, American Loan and Trust Company,
102 *Broadway, N. Y.*

CITY AND COUNTY OF NEW YORK, *ss:*

William D. Snow, being duly sworn, says: I am the secretary of The American Loan and Trust Company, the defendant above named; I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, except
760 as to the matters which are therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

(Signed) W. D. SNOW.

Sworn to before me, May 29, 1886.

H. E. DOREMUS,
Notary Public, Kings County.

Certificate filed in New York county.

Supreme Court.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated, Plaintiff,
against
ROWLAND N. HAZARD, WILLIAM FOSTER, JR., THE NEW YORK, Rutland and Montreal Railway Company, and The American Loan and Trust Company, Defendants.

To the honorable the supreme court of the State of New York:

Your petitioners, Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company, defendants in the above-entitled suit, present this their petition for the removal of this suit or controversy to the circuit court of the United States for the northern district of New York, and respectfully show to this honorable court as follows:

761 I. That this suit was begun by the service of a summons only, entitled in this court, and by leaving the same with your petitioner, Rowland N. Hazard, on or about the 8th day of April, 1886, and with your petitioner, William Foster, Jr., on or about the 8th day of April, 1886, and with your petitioner, The New York, Rutland and Montreal Railway Company, on or about the 9th day of April, 1886, and with your petitioner, The American Loan and Trust Company, on or about the 10th day of April, 1886, and

your petitioners have since duly appeared to wit: Rowland N. Hazard and William Foster, Jr., by Vanderpoel, Green & Cumming, as their attorneys of record, on the 26th day of April, 1886, and the New York, Rutland and Montreal Railway Company by Robert Ludlow Fowler, its attorney of record, on the 10th day of April, 1886; and the American Loan and Trust Company, by Blair & Rudd, its attorneys of record, on the 12th day of April, 1886.

That thereafter, to wit, a copy of the complaint herein was served on the various attorneys of record, but no other proceedings have been had on the part of the petitioners in this action, excepting that the defendant company's time to plead to the complaint has been enlarged and the defendants have answered, the last answer being served on the 9th day of June, 1880, and no term of this court has at any time heretofore been held at which this cause be first tried. That such term will not be held in the ordinary course until the fourth Monday of September next hereafter, as your petitioners are informed and believe.

II. That the plaintiff is and so was, at the time this suit was begun, a citizen of the State of Massachusetts, that is to say, a banking corporation located in the State of Massachusetts, and having its principal office and place of business in the city of Boston in said State.

762 That the petitioners, Rowland N. Hazard, and William Foster, Jr., are severally and so were, at the time this suit was begun, citizens of the State of New York, residing in the city of New York.

That the petitioner, The New York, Rutland and Montreal Railway Company, at the time of the commencement of this suit, and ever was, and now is, a citizen of the State of New York, to wit, a corporation duly formed, organized and existing under and by virtue of the laws of New York.

That the petitioner, The American Loan and Trust Company, at the time of the commencement of this suit, and ever was, and now is, a citizen of the State of New York, to wit, a corporation created, organized and existing under and by virtue of the laws of the State of New York.

III. Your petitioners further show that this is a suit of a civil nature in equity, now pending in equity, now pending in this aforesaid supreme court of the State of New York, and that the matter in dispute exceeds, exclusive of costs, the sum or value of $500, in which there is a controversy wholly between citizens of different States, to wit, wholly between the plaintiff, a citizen of Massachusetts, and the defendants, citizens of New York, as more precisely hereinbefore alleged.

IV. Your petitioners further show that they desire to remove this suit from this said State court to the circuit court of the United States for the northern district of New York, pursuant to the law in that behalf, and do now before the term of this court, at which the said cause could be first tried, and before the trial hereof, make and file herewith a bond with good and sufficient surety for their entering in such circuit court, on the first day of its now next session, a

copy of the record in this suit, and for paying all costs that
763 may be awarded by the said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in this suit if special bail was originally requisite or required therein.

Wherefore your petitioners pray this honorable court to accept this their petition and the said surety or bond, and to proceed no further in this suit.

Dated New York, September 17, 1886.

R. N. HAZARD.
WM. FOSTER, JR.
NEW YORK, RUTLAND AND MONTREAL RAILWAY COMPANY,
[L. S.] By F. A. WHITE, *President.*

Attest: WM. P. WATSON, *Secretary.*

[L. S.] AMERICAN LOAN AND TRUST COMPANY,
By R. N. HAZARD, *President.*

Attest: W. D. SNOW, *Secretary.*

ROBERT LUDLOW FOWLER,
Of Counsel for Petitioners.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Francis A. White, being duly sworn, says that he is the president of the petitioner and defendant, The New York, Rutland and Montreal Railway Company, and that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANCIS A. WHITE.

Sworn to before me this 18th day of September, 1886.

W. F. CHITTENDEN,
Notary Public, Kings County.

Certificate filed in New York county.

'64 United States Circuit Court, Northern District of New York.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated,
against
ROWLAND N. HAZARD, WILLIAM FOSTER, JR., THE New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York. } In Equity.

This cause having been commenced in the supreme court of the State of New York, and having been removed into the circuit court f the United States for the northern district of New York, upon he petition of the defendants Rowland N. Hazard, William Foster, r., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York, and the ecord of the proceedings in said cause in the said supreme court of he State of New York, and upon such removal having been filed n this court, and the said defendants Rowland N. Hazard, William oster, Jr., The New York, Rutland and Montreal Railway Comany, and The American Loan and Trust Company of New York aving entered their appearance in this cause in this court—

It is now, on motion of Robert Ludlow Fowler, attorney and solicitor for the said defendant, The New York, Rutland and Montreal Railway Company,

65 Ordered that this cause do now proceed in this court in the same manner as if it had been originally commenced herein.

Dated September 23, 1886.

UNITED STATES OF AMERICA, } ss.:
Circuit Court, Clerk's Office, Northern District of New York,

I, William S. Doolittle, clerk of said court, do hereby certify that have compared the annexed copy of order Central National Bank f Boston, etc., *v.* Hazard *et al.*, No. 5575, and the indorsements hereupon, with the original now on file in this office, and that the ame is a correct transcript therefrom, and of the whole of said riginal.

In testimony whereof, I have caused the seal of said court L. S.] to be affixed at the city of Utica, in said district, this 23d day of September, A. D. 1886.

W. S. DOOLITTLE, *Clerk.*

United States Circuit Court, Northern District of New York.

THE CENTRAL NATIONAL BANK OF BOSTON, Which Sues as Well for Itself as for All Others Similarly Situated,
against
ROWLAND N. HAZARD, WILLIAM FOSTER, JR., THE NEW YORK, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

766 To the circuit court of the United States in and for the northern district of New York, in equity sitting:

I, the undersigned, duly appointed by a decree made and entered in the above-entitled cause, at a special term of said court, held at the chambers of the circuit judge in the city of Syracuse, on the 24th day of March, 1887, master *pro hac vice* in said cause, and to whom it was referred by said decree to examine, ascertain and report who are the holders other than the complainant of the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the supreme court of the State of New York, bearing date the 2d day of April, 1881, made in an action in said supreme court wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, and how much remains due and unpaid thereon, do hereby respectfully report:

First. That, in pursuance of the directions contained in said decree, I gave notice, by advertising in two daily newspapers, to wit—the Argus and the Albany Evening Journal published in the city of Albany in said district, requiring the holders of said certificates to produce the same before me the said master at my office in the city of Albany, at a time therein designated by me, more than twenty days after the first publication of said notice, to wit—on the 7th day of May, 1887, at ten o'clock in the forenoon, and make proof as to their title thereto, and the amount due thereon, copies of which notice with proof of such publication thereof, are hereto annexed and referred to as a part of this my report.

Second. That, at the time and place specified in said no-
767 tice, I was attended by the complainant and its counsel and by other holders of said certificates and their counsel, as will more fully appear by the minutes of the proceedings before me as such master, which are hereto annexed and marked Schedule F, and are referred to as a part of this my report, and upon that day and upon subsequent days to which said hearing was adjourned, testimony was taken and proceedings had before me as such master as will fully appear by said Schedule F.

Third. I find and report that the holders of said certificates of indebtedness and the amounts respectively due thereon, so far as the same have appeared before me, are as follows, viz:

No. 633. Mrs. Louisa Strait of Troy, N. Y., is the holder of certificate No. 633 for $500 to which are attached two coupons due respectively January 1, 1886, and April 1, 1886, the former for $15

and the latter for $7.58. The amount due and unpaid thereupon at the date of this report is five hundred and seventy-eight dollars; to wit, the amount of said certificate and coupons and interest on the principal of said certificate from April 2, 1886.

No. 634. Mrs. Cornelia Hand, of Chatham, N. Y., is the holder of certificate number 634, for $500, to which are attached similar coupons as to the last-mentioned certificate. The amount due and unpaid thereupon at the date of this report is five hundred and seventy-eight dollars, to wit the amount of said certificate and coupons and interest on the principal of said certificate from April 2d, 1886.

Nos. 657, etc. The Massachusetts Mutual Life Insurance Company of the City of Springfield in the State of Massachusetts, is the holder of certificates numbers 657, 698, 655, 656, 654, 653, 652, 651, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 697, 696, 695, 694, 693, 692, 691, 690, 689, 688, 687, 686, 685, 684, 683, 682, 681, 678, 677, 675, 676, 660, 659,
768 658, 650, 649, 648, 647, 646, 645, 602, 601, 600, 599, 598, 597, 596, 593, 584, 583, 537, 536, 535, 534, 533, 113, 52, 51, 50, 49, 48, 47, 46, 45, 44, 43, 42, 41, 40, 39, 38, 37, 36, 35, 34, 33, 31, 30, 29, 28, 27, 26, 25, 24, 23, 22, 21, 20, 17, 7, 5, 16, each for $500, upon each of the last above mentioned certificates is due at the date of this report the face thereof with interest from July 1, 1886, to wit, the sum of five hundred and forty-eight dollars, in all, fifty-four thousand and eight hundred dollars.

There are no coupons attached to these last-mentioned certificates.

No. 3. Calvin H. Allen, of number 15 Broad street, in the city of New York, is the holder of certificate number 3 for $500 with coupons attached thereto, Nos. 6, 7, 8, 9, 10 for $15 each, and No. 11 for $7.58. There is due upon this certificate the face thereof, with interest thereupon from April 2, 1886, and the amount of said coupons, amounting altogether at the date of this report to six hundred and thirty-eight dollars.

Nos. 4, 32, 636. Francis & Loutrell of Maiden lane in the city of New York are the holders of certificates Nos. 4, 32 and 636, each for $500, one coupon (number 11) for $7.58 being attached to each. There is due and unpaid thereupon the face of said certificates with interest thereupon from April 2, 1886, and the amount of said coupons, amounting in all at the date of this report to sixteen hundred and eighty-nine dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

Nos. 585, etc. Peter W. French, of Boston, in the State of Massachusetts, is the holder of certificates numbers 585, 586, 587, 588, 589, 590, 591, 592, 594, and 595, each for $500, to which certificates no coupons are attached. There is due and unpaid upon each of these certificates the face thereof, with interest thereupon from
769 April 2, 1886, amounting at the date of this report to the sum of five hundred and fifty-five dollars and forty-two cents upon each of said certificates, the whole amount due upon said certificates being fifty-five hundred and fifty-four dollars and twenty cents.

Nos. 83, etc. Peter Butler, as receiver of the Pacific National Bank of Boston, is the holder subject to a pledge thereof to Lewis Coleman and John Shepard, of Boston, to protect them against their liability upon a bond given to dissolve an attachment issued in a suit brought against said bank prior to the appointment of the receiver, of certificates Nos. 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, and 112, each for $500.

To each of these there is a coupon attached for $7.58.

There is due and unpaid upon them the amount thereof with interest thereupon from the maturity thereof and the amount of said coupons, in all amounting at the date of this report to the sum of sixteen thousand eight hundred and ninety dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

Nos. 114, etc. S. R. Dickson, of No. 2 Wall street, in the city of New York, is the holder of certificates Nos. 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 279, 282, 437, 438, 439, 440, 539, 540, 541, 280, 281, 441, 442, 635, 637, 639, 640, 6, 538, 542, for $500 each. To these certificates, no coupons are attached. There is due and unpaid upon them the amount thereof, with interest thereupon from the 2d day of April, 1886, amounting at the date of this report to the sum of seventeen thousand one hundred and sixty-two dollars and sixty cents, the sum of five hundred and fifty-five dollars and forty-two cents, being due upon each of said certificates.

770 Nos. 680 and 699. Mrs. Esther K. Carter, of the city of Albany, in the State of New York, is the holder of Nos. 680 and 699 for $500 each, to each of which are attached coupons for interest due April 2, 1886, $7.58. There is due and unpaid upon these certificates the principal thereof with interest thereupon from April 2, 1886, besides the amount of the said coupons thereto annexed amounting in all at the date of this report to the sum of eleven hundred and twenty-six dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

No. 700. Mrs. H. N. Wright, of Chatham, Columbia county, N. Y., is the holder of certificate No. 700 for $500 to which are attached two coupons, one due January 1, 1886, and the other April 2, 1886, for $15 and $7.58, respectively. There is due thereupon the principal of said certificate and interest thereupon at six per cent. per annum, from the 2d day of April, 1886, besides the amount of said coupons, amounting in all to the sum of five hundred and seventy-eight dollars, at the date of this report.

Nos. 1 and 2. The estate of Cyrus S. Loutrell, deceased, is the owner and holder of certificates Nos. 1 and 2 for $500 each, to each of which are attached coupons Nos. 6 to 11, both numbers, inclusive. There is due upon these certificates the amount of $500 each principal and the amounts of the coupons, viz.: $15 upon each of the first five coupons, and $7.58 upon the sixth coupon upon each bond, together with interest upon the principal from 2d day of April, 1886, amounting in all at the date of this report to twelve

hundred and seventy-six dollars, the sum of six hundred and thirty-eight dollars being due upon each of said certificates.

Nos. 643 and 644. Mrs. Benjamin C. Gilbert, who resides at No. 291 State street, in the city of Albany, N. Y., is the owner and holder of certificates Nos. 643 and 644 for $500 each, to each of which are attached coupons Nos. 10 and 11, which coupons
771 fell due on January 11, 1886, for $15.00, and the other April 2, 1886, for $7.58. The amount due upon these last-mentioned certificates is the principal thereof, and the amount of said coupons and interest upon the principal from April 2, 1886, amounting in all at the date of this report to eleven hundred and fifty-six dollars, the sum of five hundred and seventy-eight dollars being due upon each of said certificates.

No. 638. John H. Van Tine, of Fishkill Landing, N. Y., is the owner and holder of certificate No. 638, to which no coupons attached. The amount due upon this certificate is the principal thereof, viz., five hundred dollars, with interest thereupon from the 2d day of April, 1886, at the rate of six per cent. per annum, amounting in all at the date of this report to five hundred and fifty-five dollars and forty-two cents.

It further appeared before me that William C. Van Alstyne, of the city of Albany, N. Y., is the owner of one of said certificates, but that the said certificate was not presented to me as such master, nor was any proof made as to the number thereof or the amount due thereon.

And I further find and report that Francis A. White, of the city of New York, is the holder of coupons maturing January 1, 1886, on said receiver's certificates of the Lebanon Springs Railroad Company, numbered as follows:

Certificate No. 5.

Certificates Nos.		7 to 31,	both numbers	inclusive.	
"	"	33 to 52,	"	"	"
"	"	113,			
"	"	533 to 537,	"	"	"
"	"	583 to 584,	"	"	"
"	"	593,			
"	"	596 to 602,	"	"	"
"	"	645 to 660,	"	"	"
"	"	675 to 678,	"	"	"
"	"	681 to 698,	"	"	"

772 Also of coupons maturing April 2, 1886, being coupons No. 11 on the same certificates last above mentioned.

Also coupon No. 10 on certificates Nos. 679, 680 and 689, and of coupon No. 10 on certificate No. 4.

Also of coupon No. 10 on certificates Nos. 32, 636 and coupon No. 10 on certificates Nos. 585 to 592, both numbers included, and coupon No. 10 on certificates Nos. 594 and 595.

Also of coupons No. 10 and 11 on certificate No. 638, and of coupon No. 10 on certificate No. 6.

Also of coupon No. 10 on certificates Nos. 114 to 124, both numbers included; on certificates Nos. 279 to 282, both numbers in-

cluded; on certificates Nos. 437 to 442, both numbers included; on certificates Nos. 538 to 542, both numbers included; on certificates Nos. 635 and 637, and on certificates 639 and 640.

Also of coupon No. 11 on certificates No. 6, on certificates Nos. 114 to 124, both numbers inclusive; on certificates Nos. 279 to 282, both numbers included; on certificates Nos. 437 to 442, both numbers included; on certificates Nos. 538 to 542, both numbers included; on certificates Nos. 635, 637, 639 and 640; on certificates Nos. 585 to 592, both numbers included; on certificates numbered 594 and 595.

Also of coupon No. 10 on certificates Nos. 83 to 112, both numbers included; on certificates No. 53 to 82, both numbers included; on certificates 125 to 199, both numbers included; on certificates Nos. 200 to 278, both numbers included; on certificates 283 to 399, both numbers included; on certificates Nos. 400 to 436, both numbers included; on certificates Nos. 443 to 532, both numbers included; on certificates Nos. 543 to 582, both numbers included; on certificates Nos. 603 to 632, both numbers included; on certificates Nos. 641 and 642.

That there is due and unpaid at the date of this report
773 upon said coupons the sum of nine thousand seven hundred and sixty-one dollars and thirty-six cents.

And I further find in regard to the last-mentioned coupons held by Francis A. White that said coupon No. 10 from the certificates owned and held as aforesaid by the complainant, The Central National Bank of Boston, and mentioned in Schedule M, annexed to the testimony herein were paid by Roger N. Allen acting as agent of the American Finance Company before their maturity, to the said complainant and that no transfer was taken by said Allen, as such agent, of said coupons upon such payment.

That the said coupons so paid to complainant were afterwards transferred to said White by the said finance company.

And I further find as a conclusion of law that the said Francis A. White is entitled to be paid the amount of said coupons out of any surplus of the proceeds of sale in this case remaining after the payment of the amount due upon the certificates held by the complainant and by the receiver of the Pacific National Bank of Boston, and after the payment of the amount of the certificates held by other parties than said complainant and said receiver so far as relates to the coupons from certificates held by said bank; but that as to the coupons from certificates held by said other parties and which were not paid to the complainant, the said holder is entitled to share *pro rata* in the proceeds of the said sale.

And I further report that the matter of the just proportion and amount for the holders of the said certificates other than the complainant to contribute to the expense of this suit, is postponed until after the sale has taken place pursuant to the decree, as such amount cannot be ascertained and determined until after such sale. All of which is respectfully submitted.

Dated February 7, 1888.

WILLIAM LANSING, *Master.*

774 Afterwards and before the decision of the court was rendered herein, the counsel for the said certificate-holders presented to the court proposed findings of fact and conclusions of law of which the following are copies, which were marked by the court as appears below.

Supreme Court.

AARON R. STEVENS and Others
against
THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and Others.

Proposed findings of fact and conclusions of law submitted on behalf of the defendant The Central National Bank of Boston and the other defendants, certificate-holders, pursuant to section 1023 of the Code of Civil Procedure.

First. That the Lebanon Springs Railroad Company was a corporation duly organized under and pursuant to the laws of the State of New York in the year 1852, and continued as such down to and including the first day of July, 1867, hereinafter mentioned. (Found.)

Second. That thereafter the said company constructed its line of railroad from Chatham Four Corners, in the State of New York, to the State line between the States of New York and Vermont, in Hoosick, in the county of Rensselaer, and also an extension thereof from the State line aforesaid to the town of Bennington, in the State of Vermont, which said extension was duly authorized by an
775 act of the legislature of the State of New York, passed March 8, 1853, and various acts amendatory and supplemental thereto. (Found.)

Third. By virtue of the said several acts of the legislature, the Lebanon Springs Railroad Company became, and was, vested with all the powers, franchises, rights and privileges of a railroad corporation of the State of New York, and became, and was, possessed and the owner of the following-described property:

All and singular the track and roadway of the Lebanon railroad from Chatham Four Corners in the county of Columbia at the east line of the State of New York, to the town of Hoosick in the county of Rensselaer, and all lands acquired and hereafter to be acquired for the purpose of forming said track or roadway. And all the railroad of the said Lebanon Springs Railroad Company, already built, and all the rails, bridges, fences, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging. And also all the toll, income, rents, issues and profits of any and all of the same, and of any and all of the above-mentioned powers and franchises. Also all the rolling stock, locomotives, stoves, ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars, and cars of every description, all the machine shops and blacksmith shops, all the material used in the construction, replacing and repairing the roads

and cars, and in the running of the cars. And also the Vermont and New York railroad constructed from the terminus of the railroad last above described, in the town of Hoosick aforesaid to the village of Bennington, in the State of Vermont, including all the equipment, and all the above powers and franchises of the said Vermont and New York Railroad Company belonging to or
776 in anywise appertaining to or that may at any time belong or appertain, or have belonged or appertained to the same, or either of said railroads or companies, as well in law as in equity, including also the property of every kind, name or nature, of or purchased by or in the possession of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, and also all property, powers and franchises thereof, and of each thereof, of every name or nature. (Found.)

Fourth. That on the 1st day of July, 1867, the said Lebanon Springs Railroad Company duly issued and sold to a great number of parties, its bonds of the denomination of $1,000 each, to the amount of two millions of dollars, which said bonds bore interest at the rate of seven per cent. per annum, payable on the first day of January and July in each year and the principal in thirty years from the date thereof. (Found.)

Fifth. That, to secure the payment of said bonds, the said Lebanon Springs Railroad Company on the 1st day of July, 1867, duly executed and delivered to the Union Trust Company of New York, its certain mortgage bearing date on that day, whereby it mortgaged all its property, rights, powers and franchises, including all the premises, property and rights hereinbefore stated, to the said Union Trust Company of New York, in trust to secure the payment of the said bonds. That the said mortgage contained a provision in substance the same as the condition of said bond, and with power and authority in case of default of payment of the principal or of the interest thereon, as therein specified, to sell the said property mortgaged in due form of law, and with further condition that in case default was made in the payment of the interest upon
777 the said bonds, that then the whole principal sum thereby secured became due and payable, and which said mortgage continued to be, and was at the time of the foreclosure as hereinafter mentioned, the first mortgage and lien upon all the said property, rights, powers and franchises of the said railroad company. (Found.)

Sixth. That, by reason of, and on account of, default having been made in the payment of the interest due upon said bonds on and prior to the 1st day of January, 1870, and thereafter, the whole principal sum secured by said mortgage, by the terms thereof, became then due.

Seventh. That Marvin Sackett was the holder and owner of said bonds so issued as aforesaid to the amount of eight thousand five hundred dollars, par value, and no part of the interest thereon, or upon any other of said bonds, has been paid since January 1, 1870.

Eighth. That thereafter, and in January, 1870, the Lebanon Springs Railroad Company consolidated its road, franchise and prop-

erty with the road, franchise and property of the Bennington and Rutland Railroad Company, a corporation, therefore, duly organized and existing under the laws of the State of Vermont, and owning and operating a railroad from Bennington in that State where it connected with the railroad of the Lebanon Springs Railroad Company, to Rutland in the same State, and one company was thereby formed of said two companies under the name of the Harlem Extension Railroad Company.

Ninth. That from and after the said first day of January no interest was paid upon said bonds either by the said Lebanon Springs Railroad Company or by the Harlem Extension Railroad Company. (Found.)

778 Tenth. That thereafter and on the 22d day of February, 1872, the Union Trust Company of New York began an action in the supreme court of the State of New York to foreclose the said mortgage executed by the said Lebanon Springs Railroad Company by reason of the aforesaid default in the payment of the interest thereon, in which action, The Lebanon Springs Railroad Company, The Harlem Extension Railroad Company, William Butler Duncan and James B. Hodgskin were made defendants, in which action judgment of foreclosure and for sale of all of the road, property, powers and franchises of the Lebanon Springs Railroad Company for the benefit of the holders of the bonds issued by the said Lebanon Springs Railroad Company was duly rendered by said court in that action on the 10th day of December, 1872, and on the same day entered in the clerk's office of Rensselaer county, and that under said judgment, all powers, rights and franchises therein described were sold on the 25th day of January, 1873, by Charles S. Fairchild, a referee duly appointed by said court in that behalf, at Greenbush in the county of Rensselaer, and the said property was then and there bid off by William Butler Duncan for the sum of one hundred thousand dollars, that being the highest and only bid offered therefor. (Found.)

Eleventh. That thereafter and on the same day by the direction of said Duncan, and without the knowledge or consent of the bondholders, the said premises so bid off by him as aforesaid, were conveyed by the said referee to James C. Hull, the clerk of said Duncan who was not present at such sale, by deed of conveyance, which deed was duly recorded in the clerks' office of the counties of Rensselaer and Columbia in the State of New York. (Found.)

779 Twelfth. That the terms and conditions of said sale were not complied with and no part of said purchase price of one hundred thousand dollars was ever paid by the said William Butler Duncan or James C. Hull, or by any other person or persons, and no money or valuable thing was paid on account of said sale or in connection therewith, except that the plaintiff's taxable costs and the referee's fees in the foreclosure were paid by some person or persons. (Found.)

Thirteenth. That on or about the same time, and contemporaneously with the last above action, an action was commenced by the Union Trust Company in the court of chancery in the State of

Vermont, against the Harlem Extension Railroad Company and the Lebanon Springs Railroad Company to foreclose the said mortgage, which said action duly proceeded to a judgment and decree of sale on the 6th day of December, 1872, in which decree among other things, one Daniel McEowen, of Bennington, in Vermont, was appointed a special master in chancery to conduct and make a sale of the property and franchises of the said Harlem Extension Railroad Company and of the Lebanon Springs Railroad Company in the State of Vermont, and under and in pursuance of such decree, the said road, property, powers and franchises within the State of Vermont were by said Daniel McEowen on the 20th day of January, 1873, sold to Trenor W. Park for the sum of twenty-five thousand dollars, and that by direction of said Park, the said special master executed and delivered to one Charles G. Lincoln, the clerk of said Park, deeds of the said road, property, powers and franchises bearing date the 20th day of January, 1873, which said deeds were duly recorded in the office of the clerk of Bennington county, Vermont, on the 22d day of January, 1873. That no part of said sum of twenty-five thousand dollars was ever paid by the said Park
780 or the said Lincoln or by any other person or persons whatsoever. (Found.)

Fourteenth. That neither the plaintiff nor any of the bondholders of the Lebanon Springs Railroad Company, except, perhaps, William Butler Duncan and Trenor W. Park, had any knowledge or information of the said conveyances to James C. Hull and Charles G. Lincoln, or of the non-compliance with the terms and conditions of the sale and the non-payment of the purchase price at said sales, or of any of the subsequent acts or transactions in respect to the said property until at or about the time of the commencement of an action in the supreme court of the State of New York, in which action the above-named Marvin Sackett was plaintiff, and Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company, and Daniel Butterfield, as receiver of the New York, Boston and Montreal Railway Company, were defendants, which last-mentioned action was commenced in the year 1880. (Found.)

Fifteenth. That none of the bondholders of said Lebanon Springs Railroad Company ever received any portion of the purchase price of such premises or any sum whatever, either as the avails of the said sale, or as principal or interest of said bonds. (Not found.)

Sixteenth. That thereafter and on the 30th day of January, 1873, the said James C. Hull, and Eliza A., his wife, conveyed the said premises, rights and franchises, so conveyed to him by the said Charles S. Fairchild, referee, to the New York, Boston and Montreal Railway Company for the nominal consideration of five dollars, which deed was duly recorded in the counties of Rensselaer and Columbia, State of New York. (Found.)

781 Seventeenth. That thereafter and at or about the same time the said Charles G. Lincoln conveyed the said premises, rights and franchises conveyed to him by the said Daniel McEowen, special master in chancery, to the New York, Boston and Montreal

Railway Company for a like nominal consideration, which deed was duly recorded in the county of Bennington, in the State of Vermont. (Found.)

Eighteenth. That thereafter the said New York, Boston and Montreal railway became and is utterly insolvent and one Daniel Butterfield was by the judgment of the supreme court of the State of New York duly appointed receiver of all and singular the property, rights and franchises of the said The New York, Boston and Montreal Railway Company. (Found.)

Nineteenth. That neither the said New York, Boston and Montreal Railway Company, nor the said Daniel Butterfield, the receiver thereof, ever took possession or used or occupied the said Lebanon Springs Railroad Company, or any of its franchises or claimed to exercise any control over the same, or possess any right thereto or in connection therewith, and never paid any sum or sums whatsoever as a consideration of the said pretended transfer, but, on the contrary, abandoned the same, and although the said receiver was made a party defendant in the action hereinbefore mentioned, in which the said Marvin Sackett was plaintiff, he made no claim to any right to or property therein, and judgment by default was entered in said action as against said receiver. (Found.)

Twentieth. That, from or about the time of the insolvency of the New York, Boston and Montreal Railway Company, and the appointment of a receiver thereof, and after its abandonment by the said company and the receiver thereof, down to the time
782 of the commencement of the said action in which said Marvin Sackett was plaintiff, the road, its property and franchises had been used and occupied by persons having no right or authority so to do, and the two last occupants of said road were the said Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company. That neither of said last-named parties ever had or claimed to have any authority or right to use, or occupy the said railroad or its property, or any part thereof, derived from any person or persons having a right to grant such authority. (Found.)

Twenty-first. The said action wherein said Marvin Sackett was plaintiff, was brought by said Marvin Sackett in behalf of himself and all other bondholders of the Lebanon Springs Railroad Company similarly situated, who held any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, in the complaint referred to, and who shall be entitled to avail themselves of the benefit of said suit; and in his complaint in said action, the said Marvin Sackett demanded no relief except on behalf of all the bondholders of the said The Lebanon Springs Railroad Company. (Not found.)

Twenty-second. That said action wherein said Marvin Sackett was plaintiff was commenced and prosecuted at the request and with the concurrence of a majority in amount of the holders of the said bonds of the Lebanon Springs Railroad Company, owning said bonds to the amount of $1,200,000 at their face value, and counsel retained and acting for said bondholders to the amount of $1,200,000

drew the original complaint in said action, and conducted the proceedings for the plaintiff in said action at the request and with the concurrence of said bondholders including the said Marvin Sackett.

(Found.)

783 Twenty-third. During the pendency of said action wherein said Marvin Sackett was plaintiff, certain persons claiming to hold a majority of the said bonds of the Lebanon Springs Railroad Company, applied by petition to this court at a special term for an order directing that they should be made parties to the said action either as coplaintiffs or as codefendants, and that the said petition was presented to this court at a special term thereof, and a motion made that the prayer of said petition be granted, and this court denied the said motion, the justice of this court before whom the said motion was made, making the following memorandum of his decision, which was duly filed with the clerk of the county of Rensselaer:

"The plaintiff should not be embarrassed by having united with him on the record parties whose case he may not be able to sustain. At the same time, these parties who apply should have notice of every step in the cause, so that they may protect their interests. An order may be made requiring all papers and motions to be served upon Mr. F. L. Westbrook, and allowing him as counsel to appear on trials, hearings and motions.

T. R. W.

December 28, 1880."

(Found.)

Twenty-fourth. Thereupon the attorney for the said petitioners drew and filed in the office of the clerk of the county of Rensselaer, and caused to be entered therein an order which was duly signed by the said justice of this court, of which the following is a copy:

At a special term of the supreme court of the State of New York, held at the city of Kingston, in the county of Ulster, in the State of New York, on the 10th day of December, 1880.

784 Present: Hon. T. R. Westbrook, justice.

MARVIN SACKETT
against
RUSSELL C. ROOT and Others.

A motion having been made herein by certain of the bondholders of the Lebanon Springs Railroad Company asking to be made parties to this action, either plaintiffs or defendants, and it appearing to the court that the plaintiffs' rights might be endangered if they should be united with him as parties plaintiffs, and it also appearing that said petitioners should have notice of all the proceedings had in this action, after hearing Messrs. F. L. Westbrook and L. B. Bunnell of counsel for the petitioners, and Messrs. McClellan, Andrews and Vanderpoel, of counsel for the plaintiff, the counsel for the petitioners having withdrawn the application in their behalf,

except as to I. G. Mills, G. T. Bonner & Co., L. T. Hoyt, John Bloodgood & Co., A. L. Hopkins, Aaron Wolff, Jr., and Amb. B. Baylis, it is on reading and filing the petition and notice of motion of F. L. Westbrook, of counsel for the petitioners, ordered that the said motion, so far as it asks that the petitioners may be made parties, be and the same is hereby denied.

It is further ordered, that the plaintiff's attorneys be and they are hereby required to serve copies of all papers and notices of every kind which shall be served herein, upon Mr. F. L. Westbrook, of Kingston, Ulster county, New York, and he is hereby authorized and allowed to appear as counsel in behalf of the said bondholders hereinbefore mentioned, upon all trials, hearings and motions herein.

Enter in Rensselaer county.

T. R. WESTBROOK.

(Found.)

785 Twenty-fifth. Frederick L. Westbrook, Esq., the person named in said decision and order was a counselor of this court then residing at Kingston in the county of Ulster, and had been employed as counsel for said petitioners, bondholders as aforesaid, and had appeared for them upon the presentation of the said petition, and the said motion, and upon the argument of the motion upon the presentation of said petition, it was understood and agreed between the attorneys for said petitioners, Lyman B. Bunnell, Esq., and said Frederick L. Westbrook, that the said Frederick L. Westbrook should be the person to be designated in such order upon whom notices should be served. (Found.)

Twenty-sixth. After the granting of the order set forth in the above finding twenty-fourth, the said order was complied with by the plaintiff's attorneys, and all notices and other papers in the action were thereafter served upon said Frederick L. Westbrook, as attorney for the said bondholders, and no move was made or step taken in said action by the plaintiff's attorneys, of which the said Frederick L. Westbrook did not have notice as well as the other parties to said action. (Not found.)

Twenty-seventh. One Edward Crane, during the pendency of the said action wherein Marvin Sackett was plaintiff, was the owner of said bonds issued by the Lebanon Springs Railroad Company, amounting to between $500,000 and $700,000, face value. Said Edward Crane while the holder of such bonds was consulted in regard to the said suit, and was represented in the said Sackett suit by the attorney and counsel who conducted the said suit in the name of said Sackett. (Found.)

Twenty-eighth. The defendant, William Butler Duncan, and Trenor W. Park, since deceased, of whose estate the defendant,

786 John G. McCulloch, is administrator, made their petition in the said action wherein Marvin Sackett was plaintiff, asking that they might be made parties defendant to said action. The said Park in his petition represented that he was owner of over $300,000 of the bonds of the Lebanon Springs Railroad Company. Said petition was granted to this court at special term at the same time with the other petition mentioned in the twenty-third finding above, and

a motion made that the prayer of said petition be granted, which motion was not granted. (Found.)

Twenty-ninth. None of the said petitioners appealed from the decision or order of this court denying the motion to make them parties respectively as aforesaid. No decision was ever filed or order ever entered upon or in relation to the petition of said Duncan and Park, although their application was not granted. (Found.)

Thirtieth. That in said action in the supreme court wherein Marvin Sackett was plaintiff, and Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, The New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver, as aforesaid, were defendants, one John W. Van Valkenburgh was on the 1st day of October, 1880, duly appointed receiver of the said Lebanon Springs Railroad Company, its property and franchise, and in or about November, 1880, duly qualified and entered upon the discharge of his duties as such receiver. (Found if the word "duly" is omitted, otherwise not found.)

Thirty-first. That on or about the 23d day of November, 1880, an action was duly commenced by leave of this court in the name of the People of the State of New York by the attorney general of the State against the said Lebanon Springs Railroad Com-

787 pany, the complaint in which action was as follows:

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE LEBANON SPRINGS RAILROAD COMPANY.

The plaintiff complaining by Hamilton Ward, the attorney general, alleges: That the defendant is a railroad corporation created by and under the laws of the State of New York, organized pursuant to an act of the legislature of this State, entitled "An act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, and the acts amendatory thereof and supplementary thereto."

That said defendant, the incorporated company above named, was insolvent in 1872, and has remained insolvent for one whole year, and is now insolvent, and has been so insolvent for more than one whole year last past, and for one year last past has neglected and refused to pay and discharge its notes and other evidences of debt, and said corporation, the defendant herein, has suspended the ordinary and lawful business of such corporation for more than one year, and said railroad has not been operated by said corporation, the defendant herein, for more than five years last past, wherefore the plaintiff demands judgment.

I. That said corporation be adjudged insolvent.

II. That said corporation be adjudged to be dissolved.

788 III. That said corporation be adjudged to surrender the rights, privileges and franchises granted by the acts of incorporation as acquired under the laws of this State.

IV. That said incorporated company, the defendant aforesaid, and its officers and agents, be restrained from exercising any of its corporate rights, privileges or franchises, and from collecting or securing any debts or demands, and from paying out or in any way transferring or delivering to any person or persons, any of the moneys, property or effects of such corporation until the further order of the court.

V. That a receiver of the property and effects of said defendant, the incorporated company as aforesaid, may be appointed pursuant to the provisions of the Revised Statutes and the law, with all the power and authority conferred, subject to all the obligations and duties imposed upon receivers in such cases made and provided.

VI. And for costs of this action.

HAMILTON WARD,
Attorney General, Plaintiff's Attorney.

(Not found.)

Thirty-second. In the said action wherein The People of the State of New York were plaintiffs and the said Lebanon Springs Railroad Company was defendant, an order was duly made on the 4th day of December, 1880, upon notice to the defendant, appointing the said John W. Van Valkenburgh as receiver of the said Lebanon Springs Railroad Company with its appurtenances, franchises and rolling stock or equipments, and of the income and earnings thereof, its goods, chattels and credits and its property both real and personal of every kind, with all the powers of a permanent receiver; and by said order, it was provided that said receiver should possess
789 all the powers and authority conferred, and be subject to all the obligations and duties imposed upon receivers by the provisions of the Revised Statutes, Code of Civil Procedure, or any act amendatory thereof, or supplemental thereto, and the said Van Valkenburgh shortly after his said appointment, and in the said month of December, 1880, duly qualified and entered upon the discharge of his duties as such receiver, so appointed in said last-named action. (Not found.)

Thirty-third. That the said Van Valkenburgh, soon after his appointment as such receiver in the said suit brought by Marvin Sackett, took possession of the railroad and property of the said Lebanon Springs Railroad Company, and after his appointment in the said action wherein The People of the State of New York were plaintiffs, continued in possession of said railroad and property and franchises under the appointments in both said actions above mentioned, and continued in possession and to operate the said railroad as such receiver under both said appointments, until his resignation and the appointment of his successor hereinafter mentioned. (Found.)

Thirty-fourth. That, upon the appointment of Van Valkenburgh as receiver, it appeared to the court that there was no rolling stock or means of operating the road or making necessary repairs thereon, and that thereupon to relieve the immediate pressing necessity, the court ordered the issuing of $25,000 par value of receiver's certificates; and afterwards upon the further representation of the re-

ceiver of the condition of the road, and its wants, an engineer expert was appointed by the court to examine into the condition of the road and report to the court; that upon that report being presented, it appearing that a larger sum of money was necessary to preserve and protect the property, and keep it running, the court ordered the issue of $350,000 face value of certificates $25,000 to be used to repay the first $25,000, and the other $325,000 to be used for the necessary wants of the road and its preservation. The order so made is the same as Exhibit A annexed to the answer of the defendant, The Central National Bank of Boston in this action, and was made upon the papers and proceedings in said order mentioned. (Found.)

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Thirty-fifth. Certificates of indebtedness amounting in aggregate to $350,000 were issued and negotiated by the said receiver pursuant to said last-named order. Said certificates were in the form of Exhibit B annexed to the answer of the defendant, The Central National Bank of Boston in this action. (Found.)

Thirty-sixth. The defendant, The Central National Bank of Boston, became the purchaser for value of said receiver certificates to the amount of $250,000, which the said bank now holds and owns. (Found.)

Thirty-seventh. The said Van Valkenburgh forthwith, after his appointment as receiver, made diligent inquiry to ascertain the names and places of residence of the holders of the Lebanon Springs railroad bonds, and notified by letter such bondholders as he could ascertain, of his appointment as such receiver. (Found.)

Thirty-eighth. The said action in which said Marvin Sackett was plaintiff was brought on for trial at a special term of this court. After said trial, the court duly filed its decision, dated December 13, 1884, by which it found substantially the facts stated in the above findings from the first to the nineteenth, inclusive (excepting the seventeenth above finding of fact), and also found the following conclusions of law:

791

1. That the said purchase by Duncan was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them.

2. That the conveyance by the referee to James C. Hull in accordance with the directions of Duncan, merely vested the title in Hull as trustee for the bondholders in whom the beneficial interest still remains.

3. That the conveyance by Hull and wife to the New York, Boston and Montreal Railway Company was wholly ineffectual to pass any title to the New York, Boston and Montreal Railway Company, or to divest the bondholders of any right therein.

4. That the title to and beneficial interests in the said railway company, its rights and franchises was continued to be and is in the bondholders of the said Lebanon Springs Railroad Company.

5. That the said property, franchises and powers, of the Lebanon Springs Railroad Company, as described in and enumerated in the said mortgage made by the Lebanon Springs railroad to the Union Trust Company, and all of the right, title and interest of any and of

all the parties to this action, be sold at public auction according to the rules and practices of this court in actions for foreclosure of mortgages, and that all the parties to this action be barred and foreclosed of all right, title and interest in and to such property, powers and franchises, or any part thereof, and that a referee be appointed to make such sale under the rules and practice of this court. That in the decree or judgment to be entered in this action, such claim or claims shall be inserted therein, as in the judgment of the court shall be necessary to protect the holders of receiver's certificates heretofore issued by the order of this court, or any person or
792 persons who have valid claims upon the property and effects in the hands of the receiver in consequence of the action of the receiver, or any order of this court.

Judgment in said action was rendered January 12, 1885, and filed in the office of the clerk of the county of Rensselaer on the 27th day of January, 1885. A true copy of said judgment is annexed to the answer of the defendants Royal E. Robbins and others, marked "Exhibit A," except that the judgment contained a full description of the mortgaged premises described in the complaint herein.

(Found, if the word "duly" is omitted; otherwise not found.)

Thirty-ninth. The proceedings in the said Sackett suit especially those relating to the issue of receiver's certificates and the negotiation thereof, were matters of great public notoriety and comment during the pendency of said suit. A legislative investigation was had respecting the same in the year 1882, and the facts that the order was made authorizing the issuing and negotiation thereof, and the circumstances attending the same, were proved upon such investigation, and were published very widely in the newspapers in the city of New York and elsewhere in the State of New York and in other States. The holders of the bonds of the Lebanon Springs Railroad Company, above referred to, generally had actual notice and knowledge of the pendency of such suit, and of the proceedings therein, and especially of the appointment of John W. Van Valkenburgh, as receiver, and of the issuing and negotiation of the said receiver's certificates under the order of the court in said suit. (The investigation by the legislature was a matter of great notoriety but not as to issue of certificates. Otherwise not found.)

793 Fortieth. The attorneys for the plaintiff in this action had actual knowledge of the pendency of the Sackett suit, and to some extent participated therein, as counsel for Marvin Sackett, the plaintiff in said action. (Not found.)

Forty-first. Upon the hearing and rendering of judgment in the said action wherein Marvin Sackett was plaintiff, Hamilton Harris, Esq., appeared as counsel for the bondholders of the Lebanon Springs Railroad Company who had not been made parties to said action by name. Mr. Harris had been requested so to act by Frederick L. Westbrook, Esq., the attorney mentioned in the order mentioned in the 24th finding above, and also by Henry A. Tilden, for himself and his brother Samuel J. Tilden, who were large holders of said bonds. (Not found.)

Forty-second. That the said action in which Marvin Sackett was plaintiff, was brought for the benefit of all the holders of the above-mentioned bonds amounting to $2,000,000 face value, of the Lebanon Springs Railroad Company; that in the progress of said action at some of the different hearings therein, substantially all of the said bonds were directly represented by counsel. (Not found.)

Forty-third. That there is no evidence in this case that Aaron R. Stevens, the original plaintiff herein, nor any or either of the other plaintiffs brought in during the progress of this action, or their predecessors, the owners of the bonds represented in this action by the plaintiffs herein, were not represented by counsel in the said Sackett suit, or that they or either of them did not have full notice and knowledge of all the proceedings in the said action wherein Marvin Sackett was plaintiff. (Found; there is no evidence on the subject.)

794 Forty-fourth. That on the 25th day of June, 1883, an order was duly made in the Sackett suit appointing William V. Reynolds, as receiver of the Lebanon Springs Railroad Company, in place of the said John W. Van Valkenburgh, resigned. That after the said sale under the judgment in the Sackett suit, the said William V. Reynolds, as receiver of the Lebanon Springs Railroad Company, brought an action against the defendant The Central National Bank of Boston, claiming and alleging that the said defendant, The Central National Bank of Boston, was not the holder and owner of the said certificates amounting to $250,000, but had wrongfully obtained possession of the same, and alleging that said certificates and coupons annexed thereto, were wholly void, and had no force or validity against the said receiver, and the bondholders whom he represented, and demanding judgment that the said certificates and the coupons annexed, were of no force or validity, and that the same be delivered up to the plaintiff as such receiver to be canceled, and that the said defendant, The Central National Bank of Boston, duly served its answer to the complaint in that action alleging that it was the holder and owner of said certificates amounting to $250,000, and praying that the complaint in said action be dismissed; that afterwards upon the motion of the said defendant, an order was duly made in said action, directing and requiring the said William V. Reynolds, as receiver, to discontinue the said action brought by him against the Central National Bank of Boston, and thereupon and on the 28th day of November, 1885, judgment was rendered in said action in favor of the said defendant, The Central National Bank of Boston, against the said William V. Reynolds, as receiver as aforesaid. (Found.)

795 Forty-fifth. That out of the said sum of $155,000, the purchase price of the said premises upon the sale to Foster and Hazard, the interest due and unpaid upon the said receiver's certificates, held by the defendant, The Central National Bank of Boston, and by the defendants, The Massachusetts Life Insurance Company and the receiver of the property of the Pacific National Bank of Boston, was paid and the balance of said purchase-money was used

and applied as directed by the judgment in said Sackett suit. (Found.)

Forty-sixth. That the principal of the said certificates became due on the 1st day of April, 1886, but was not paid, and thereupon in the month of April, 1886, the defendant The Central National Bank of Boston brought an action in this court in behalf of itself as well as other holders of receiver's certificates, in which the said bank, suing as well for itself as for all others similarly situated, was plaintiff, and the defendants Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York, were defendants; that all of the defendants in said action appeared and answered therein; that after issue was joined, the said action, on the petition of the defendants was duly removed into the circuit court of the United States for the northern district of New York; that after said removal, testimony was taken in said suit in behalf of all the parties thereto, and the said suit was finally brought to a hearing upon the pleadings and proofs therein, and a decision and decree was therein made by said circuit court of the United States, of which decree, a true copy is annexed to the answer herein of the said defendant, The Central National Bank of Boston, marked C; that under and in pursuance of the said decree, the referee named therein has advertised the property and franchises in said
796 decree described for sale pursuant to the rules and practice of said court, and the said premises which are the same premises described in the complaint in this action, are now duly advertised for sale under the said decree of the circuit court of the United States. (Found.)

Forty-seventh. That since the rendering of said decree, the defendants The Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Louisa Straight, William C. Van Alstyne, Esther K. Carter, Calvin H. Allen, Cyrus L. Loutrell, Louisa M. C. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, Cornelia Hand, Peter W. French, S. R. Dickson, John H. Van Tine and —— Bonner, have duly appeared before the master *pro hac vice* mentioned in the said decree, and produced their certificates, and made proof of their title thereto, and the amount due thereon. (Found.)

Forty-eight. That the defendant James C. Hull paid no consideration for the conveyance made to him by Charles S. Fairchild, referee, upon the sale in the foreclosure suit wherein the said Union Trust Company of New York was plaintiff. (Found.)

Forty-ninth. That no consideration was paid by the defendant Charles G. Lincoln for the deed executed to him by Daniel McEowen, special master in chancery, dated January 20, 1873. (Found.)

Fiftieth. That the mortgage executed by the defendant James C. Hull and Melissa A. Hull and Charles G. Lincoln to William Butler Duncan and Trenor W. Park, dated January 28th, 1873, pur-

porting to be to secure the payment of the sum of five mil-
797 lions of dollars, was entirely without consideration as between the parties thereto, and there was at the time of the execution of the said mortgage, no indebtedness whatever existing from the said mortgagors to the said Duncan and Park, the mortgagees therein named. (Found.)

Fifty-first. That the executive officers of the defendant The Union Trust Company, had knowledge and notice of the pendency of the said suit wherein Marvin Sackett was plaintiff, and of the proceedings therein, including the issue and sale of the said receiver's certificates, and the sale of said premises under the judgment therein, and stood by and permitted such certificates to be issued and negotiated and such premises to be sold without making any objection thereto, or asking to be made a party to the said action. (I find that the vice-president of the Union Trust Company was examined as a witness in the suit of Sackett against Root. Otherwise not found.)

Fifty-second. That on the 12th day of June, 1885, the property, franchises and rights of the Lebanon Springs Railroad Company were duly sold by George McClellan, as referee, at public auction in the town of Greenbush, county of Rensselaer, and State of New York.

That at said sale the said premises, franchises and property were then and there fairly struck off to William Foster, Jr., trustee, for the sum of one hundred and fifty-five thousand dollars, he being the highest bidder therefor, and that being the highest sum bidden for the same. (Found if the word "duly" is omitted. Otherwise not omitted.)

That the whole of said purchase price was thereafter paid to the said William Foster, Jr., in fulfillment of the said terms of
798 sale, and a deed of conveyance of all and singular the said property, rights and franchises of the Lebanon Springs Railway Company was duly executed by said George McClellan, as such referee, to the defendants, William Foster, Jr., and Rowland N. Hazard. (Not found.)

That by the terms and conditions of said judgment and decree and of the terms of sale, in addition to the sum of one hundred and fifty-five thousand dollars in cash paid as aforesaid, the said purchasers were required to pay the principal and interest of the said receiver's certificates as a part of the purchase price of the said railroad property and franchises. (Not found.)

Fifty-third. That in addition to the sum of one hundred and fifty-five thousand dollars in cash paid, and the assumption by the said purchasers, Foster and Hazard, of the payment of the principal and interest of the receiver's certificates, the said Foster and Hazard incurred and became liable to pay large sums in addition thereto, and have already paid, laid out and expended, or have became liable to pay, sums aggregating ninety thousand dollars and upwards in repairs and improvements upon the said railroad and property. (Not found.)

Fifty-fourth. That said purchase of the said property made by

the said Foster and Hazard was made in good faith, and the subsequent payment made by the said Foster and Hazard in connection therewith, and the moneys paid, laid out and expended by them in repairs and improvements upon said property, were each and all made in good faith and for the benefit of the said property, and the said Foster and Hazard are entitled to a lien upon said premises for the full amount of all such payments made and expenses
799 incurred by them in consequence thereof or in connection therewith. (Not found.)

Fifty-fifth. That the original plaintiff in this action, Aaron R. Stevens, is not a purchaser in good faith of the bonds claimed to be owned by him. He took the bonds and became the plaintiff in this action in order to oblige one of the plaintiff's attorneys. He paid nothing for the bonds upon which he brought this action. (Not found.)

Conclusions of Law.

1. That the judgments and decrees in the actions of foreclosure in which The Union Trust Company was plaintiff, and The Lebanon Springs Railroad Company, The Harlem Extension Railroad Company, William Butler Duncan and James B. Hodgskin, were defendants, were final and conclusive, and forever barred and foreclosed all and every of the bondholders of all right, title, interest and equity of redemption in and to the said mortgaged premises and to each and every part thereof. (Found.)

2. That the Union Trust Company was the trustee under said mortgages and the trustee of the said respective bondholders, and duly represented the said bondholders in said actions and for and on behalf of the said bondholders therein, and said bondholders though not made parties thereto individually, were each and all nevertheless bound by the said judgment and decrees and absolutely concluded thereby. (Found.)

3. That the said action in which Marvin Sackett was plaintiff was a representative action, and that the said Marvin Sackett represented therein all the holders of bonds of the Lebanon
800 Springs Railroad Company, who held any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, issued on or about the 1st day of July, 1867, and dated on that day. (Not found.)

4. That from and after the time of the entry of judgment in said action wherein Marvin Sackett was plaintiff, all the bondholders last above mentioned became and were entitled equally with the said Sackett to the benefit of said judgment, and became and were equally with said Sackett bound by the provisions thereof. (Not found.)

5. That the decision and the findings of fact and conclusions of law and the judgment in the said action wherein Marvin Sackett was plaintiff were binding and conclusive upon the parties thereto, including as such parties all holders of the said bonds, and including the plaintiffs herein, as such bondholders, and that the said

decision, findings of fact and conclusions of law, and judgment, are hereby ratified and confirmed. (Not found.)

6. That none of the defendants in this action have any interest in or lien upon the said premises as against the defendants, Foster and Hazard, the purchasers under the judgment in the said action wherein Marvin Sackett was plaintiff. (Not found.)

7. That the defendants, James C. Hull and Melissa A. Hull, acquired no title or interest in the said premises by the deed to said James C. Hull from Charles S. Fairchild, referee, as against the holders of said bonds of the Lebanon Springs Railroad Company. (Found.)

8. That the defendant, Charles G. Lincoln, as against the said bondholders, acquired no title to or interest in or lien upon
801 the premises described in the deed to him made by Daniel McEowan, special master. (Found.)

9. That the defendant, The New York, Boston and Montreal Railway Company acquired no title to the said Lebanon Springs railroad, its property or franchises by the conveyance to it from the defendants, Hull and wife, and Lincoln, as against the said bondholders. (Found.)

10. That the mortgage for five millions of dollars executed by the defendants, Hull and wife, and Lincoln, to the defendants, William Butler Duncan and Trenor W. Park, was void, and created no lien upon the premises described in said mortgage as against the said bondholders of the Lebanon Springs Railroad Company. (Not found.)

11. That the mortgage executed by the defendant The New York, Boston & Montreal Railway Company to the defendants Jesse Seligman, William Watts Sherman and John Crosby Brown, and to the New York Loan and Indemnity Company, were and each of them was void, and created no lien upon the premises described in the complaint herein, as against the said bondholders of the Lebanon Springs Railroad Company. (Not found.)

12. That the receiver's certificates issued by John W. Van Valkenburgh, as receiver, and held by the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company, and by the other persons who have appeared before the master *pro hac vice*, and produced their certificates, are as against all of the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the railroad and prem-
802 ises described in the complaint herein, as provided in and by the said order of April 2, 1881, and as adjudged in the judgment in the said action wherein Marvin Sackett was plaintiff, and as also adjudged by the circuit court of the United States by its decree in the action of The Central National Bank of Boston *vs.* Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the master *pro hac vice* named in the said last-named decree, and as reported by said master. (Not found.)

—. That the defendant, William Foster, Jr., and Rowland N. Hazard, by virtue of their purchase at the referee's sale under the judgment in the said action wherein Marvin Sackett was plaintiff, and the conveyance to them by the said referee acquired as against all the parties to this action a good and sufficient title to the premises described in the complaint herein subject to the payment of the said receiver's certificates, as provided in the said judgments. (Not found.)

14. That judgment be entered in accordance with the above findings and conclusions, and that the complaint herein be dismissed upon the merits, and that the defendants, The Central National Bank of Boston, and the other certificate-holders do recover of the plaintiffs their costs and disbursements in this action. (Not found.)

If, however, for any purpose, the court should be of opinion that a sale of the premises is necessary, then we ask that in case any judgment for sale is made or ordered.

15. That such sale be subject to the rights of the defendant, The Central National Bank of Boston, and the other defendants, holders of receiver's certificates, and that said certificates be paid to
803 said certificate-holders first out of the proceeds of any sa le that may be had herein. (Not found.)

HALE & BULKELEY,
Attorneys for Defendants, The Central National Bank of Boston and Other Certificate-holders.

And the court thereafter made its decision, a copy of which is contained in the judgment-roll printed herewith, and to which decision the defendants, The Central National Bank of Boston, and the other holders of receiver's certificates filed the following exceptions:

Supreme Court.

AARON R. STEVENS and Others
against
THE UNION TRUST COMPANY OF NEW YORK and Others.

Exceptions to the decision of the court herein, taken and filed by the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; The Massachusetts Mutual Life Insurance Company, Mary Strait, William G. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, and other defendants, owners and holders of certificates issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company.

The above-named defendants hereby except to the following finding of fact made by the court herein contained in its decision
804 as filed in the Rensselaer county clerk's office on or about the 11th day of November, 1891.

First. Said defendants except to the finding of fact that the mort-

gage for $5,000,000 executed by the defendants Hull and Lincoln to the defendant Duncan, and one Trenor W. Park, on or about the 1st day of August, 1873, represented substantially the aggregate indebtedness, being the bonds of the Lebanon Springs Railroad Company, and the Harlem Extension Railroad Company, which the defendant, The New York, Boston and Montreal Railway Company was to assume and pay.

Second. Said defendants also except to the finding of fact that the said mortgage for $5,000,000 was made in order to secure and maintain a lien upon the said premises for the payment of said indebtedness.

Third. Said defendants also except to the finding of fact that in accordance with said arrangement and agreement so made on or about February 11, 1873, between the defendant, The New York, Boston and Montreal Railway Company, and the said Duncan and Park, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company to the defendant Duncan, who was to have the custody of said moneys, and to disburse the same to secure the payment and discharge of the said $5,000,000 mortgage.

Fourth. Said defendants also except to the finding that the said bond and mortgage together with the satisfaction thereof in writing, were placed in custody of Jesse Seligman and John Crosby Brown.

Fifth. Said defendant- also except to the finding that said
805 Seligman and Brown were in accordance with the provisions of said agreements and arrangements, and were authorized by power of attorney to receive and endorse upon said bonds, payments that should be made thereon.

Sixth. Said defendants also except to the finding of fact that upon full payment thereof, if within the time stipulated, said Brown and Seligman were to file said satisfaction piece and thus discharge said mortgage of record.

Seventh. Also to the finding of fact that in case of a failure by said company to pay the full amount due on or before the 1st day of August, 1873, said Brown and Seligman were to redeliver said bond and mortgage with the satisfaction piece to the said mortgagees.

Eighth. Also to the finding that said last-named company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage.

Ninth. Also to the finding that said mortgage long since and on or before February 1st, 1875, became wholly due and payable.

Tenth. Said defendants also except to the finding of fact that enough of the bonds of the two mortgages of $12,250,000, and $12,750,000, were sold in Europe to realize $6,000,000 which were received and disbursed by the defendants, Seligman and Brown.

Eleventh. Also to the finding of fact that this plaintiff and other like bondholders are entitled to have a sale under the bill filed in the court of chancery of Vermont to foreclose said $5,000,000 mortgage prece-ded with for their benefit and on the- behalf.

Twelfth. Said defendants except to the portion of the find-
806 ings of fact herein which purport to state the contents of the complaint in the action brought by Marvin Sackett against Russell C. Root and others, as incorrect, imperfect and incomplete.

Thirteenth. Said defendants also except to the portion of the findings of fact contained in said decision purporting to state the proceedings in said Sackett action as imperfect, incomplete and incorrect.

Fourteenth. Defendants except to the finding of fact that on the 10th of October, 1884, a trial was had between the counsel for the plaintiff and counsel for the Central National Bank of Boston and the other owners of receiver's certificates, and the Hon. Hamilton Harris.

Fifteenth. Said defendants except to the finding of fact that "as a result the court found, among other things, that Hull and Lincoln held the title as trustees for the bondholders, although neither was a party to the action."

Sixteenth. Defendants also except to the portion of the findings of facts herein purporting to state the contents of the judgment rendered in said Sackett suit, as imperfect, incomplete and incorrect.

Seventeenth. Defendants except to the finding that the amount bid at the sale under said Sackett judgment of $155,000 had been made up by the receiver on the 2d of June, 1885, and was composed of the following items: Counsel fees, $27,299.21; interest on certificates, $64,156.66; receiver's commissions, $15,851.56; taxes, $2,290.55, and debts of the receivership, the balance.

Eighteenth. Said defendants except to the portion of said
807 decision which purports to state the proceedings and decree in the action brought by the defendant, The Central National Bank of Boston, as incomplete, imperfect and incorrect.

Nineteenth. Said defendants except to the finding of fact that the receiver Van Valkenburgh received from the certificates $236,500 and no more.

Twentieth. Said defendants also except to the findings as to what said receiver paid, as incomplete and incorrect.

Twenty-first. Said defendants except to the finding of fact that the suit of Sackett against Root was neither brought nor conducted for the purpose of realizing the property to the owners of the said Lebanon Springs bonds.

Twenty-second. Said defendants also except to the finding of fact that said action of Sackett against Root was brought and conducted for the purpose of realizing out of the property certain individual claims of the said Sackett and Tilden, in preference of and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property and were behind the mortgage.

Twenty-third. Said defendants except to the finding of fact that there is now, to wit, November 10, 1891, due and unpaid upon the said mortgage for $5,000,000, given by Hull and Lincoln to Park

and Duncan, the sum of $4,192,922.95, with interest from the 1st of February, 1875.

Twenty-fourth. Said defendants also except to the finding of fact that there is now due upon the mortgages to Brown, Seligman and Sherman and the New York Loan and Indemnity Company, the sum of six millions of dollars with interest from January 1, 1875.

808 Twenty-fifth. Said defendant- except to the first conclusion of law contained in said decision, and to each and every part thereof.

Twenty sixth. Also to the second conclusion of law and to each and every part thereof.

Twenty-seventh. Also to the third conclusion of law and to each and every part thereof.

Twenty-eighth. Said defendants except to the conclusion of law that the action brought in this court by Marvin Sackett, was not a representative action.

Twenty-ninth. Also to the conclusion of law that said action was not so (a representative action) in fact, nor intended to be.

Thirtieth. Also to the conclusion of law that it was not a representative action because the Union Trust Company was not made a party.

Thirty-first. Also to the conclusion of law that the plaintiffs and all the other holders of said bonds and the Union Trust Company, are now entitled to have the judgment, and all the proceedings in that suit, including the sale and the deed by the referee to the defendants, Foster and Hazard, reviewed and reversed.

Thirty-second. Also to the conclusion of law that the plaintiffs and all other holders of bonds and the Union Trust Company are entitled to have all the property and franchises described in the complaint together with all the interests therein of all the parties to this suit and of all the Lebanon Springs and Harlem Extension bondholders sold for the purposes in said decision stated.

809 Thirty-third. Said defendants except to the conclusion of law that the plaintiffs have costs of the action.

Thirty-fourth. Also to the finding that plaintiffs are entitled to an additional allowance of $2,000, this being a difficult and extraordinary case.

Thirty-fifth. Said defendants except to the direction for judgment contained in said decision perpetually enjoining all suits similar to this by any Lebanon Springs or Harlem Extension bondholders.

Thirty-sixth. Also to the direction of judgment perpetually enjoining in the usual form all suits to enforce any lien upon, or to affect any of the said property or franchises or any interest therein by any of the holders of certificates issued by the receiver Van Valkenburgh, their agents, attorneys and servants.

Thirty-seventh. Also to the direction of judgment adjudging that all the franchises and powers described in the complaint are in full life and vigor, and none of them lost or lapsed.

Thirty-eighth. Also to the direction for judgment adjudging in the usual form of a decree upon a bill of review, that the judgment

and all proceedings in the suit brought by Marvin Sackett, including the sale thereunder and the referee's deed, be now reviewed and reversed.

Thirty-ninth. Said defendants also except to the direction for judgment permanently enjoining the sale in the suit by the Central National Bank of Boston.

810 Fortieth. Also to the direction for judgment adjudging that the judgments and decrees of 1872 be now enforced.

Forty-first. Also to the direction for judgment, appointing a referee to sell all said property and franchises with the usual directions upon foreclosure sales, and to distribute the proceeds.

Forty-second. Also to the direction for judgment barring and foreclosing in the usual form all parties to this suit, and all Lebanon Springs and Harlem Extension bondholders.

Forty-third. Also to the direction for judgment continuing the receiver until the delivery of the referee's deed and its confirmation by the court, and directing him then to deliver possession to the purchaser.

Forty-fourth. Also to the direction for judgment appointing a referee in the usual form to determine upon the evidence already taken, and the findings and proofs upon which the order was made 25th April, 1891, upon motion of S. A. Rockefellow and others, and such other evidence as shall be presented, who are the owners of the said Lebanon Springs and Harlem Extension bonds.

Forty-fifth. Also to the direction for judgment appointing a referee to determine upon evidence, who are the holders of receiver's certificates.

Forty-*fifth*. Also to the direction for judgment as to which of said bonds were actually in the Sackett suit, together with the amount paid thereon.

Forty-seventh. Defendants also except to the direction that in the said judgment, it shall be specially provided that the evidence already taken, and the findings hereinafter made shall not

811 be conclusive as against any person not a party to this suit, upon the question as to whether his bonds were actually in Sackett's suit.

Said defendants also except to the refusals of the said court to find findings of fact and conclusions of law proposed by the said defendants and submitted to the court, as follows:

First. To the refusal and omission of the court to find the fifteenth proposed finding of fact submitted by said defendants.

Third. To the refusal and omission of the court to find the twenty-first proposed finding of fact submitted by said defendants.

Third. To the refusal and omission to find the twenty-sixth proposed finding of fact submitted by said defendants.

Fourth. To the refusal and omission of the said court to find in pursuance of the thirtieth proposed finding of fact.

Fifth. To the refusal and omission of the said — to find in pursuance of the thirty-first proposed finding of fact.

Sixth. Also to the refusal and omission of the court to find the thirty-second proposed finding of fact.

Seventh. Also to the refusal and omission of the court to find the thirty-eighth proposed finding of fact in the language proposed by said defendants.

Eighth. Also to the refusal and omission of the court to find the thirty-ninth of said proposed findings of fact in the language proposed by the said defendants.

812 Ninth. To the refusal and omission of the court to find the fortieth proposed finding of fact submitted by said defendants.

Tenth. To the refusal and omission of the court to find the forty-first proposed finding of fact submitted by said defendants.

Eleventh. To the refusal and omission of the court to find the forty-second proposed finding of fact submitted by said defendants.

Twelfth. To the refusal and omission of the court to find the fifty-first proposed finding of fact submitted by said defendants, in the language of said proposed finding.

Thirteenth. To the refusal and omission of the court to find the fifty-second proposed finding of fact submitted by these defendants in the language of said finding.

Fourteenth. To the refusal and omission of the court to find the fifty-third proposed finding of fact submitted by these defendants.

Fifteenth. To the refusal and omission of the court to find the fifty-fourth proposed finding of fact.

Sixteenth. To the refusal and omission of the court to find the fifty-fifth proposed finding of fact submitted by these defendants.

Seventeenth. These defendants except to the refusal and omission of the court to find the third proposed conclusion of law submitted by said defendants.

813 Eighteenth. Also to the refusal and omission of the court to find the fourth proposed conclusion of law submitted by these defendants.

Nineteenth. Also to the refusal and omission of the court to find the fifth proposed conclusion of law submitted by these defendants.

Twentieth. Also to the refusal and omission of the court to find the sixth proposed conclusion of law submitted by said defendants.

Twenty-first. Also to the refusal and omission of the court to find the tenth proposed conclusion of law submitted by these defendants.

Twenty-second. Also to the refusal and omission of the court to find the eleventh proposed conclusion of law submitted by these defendants.

Twenty-third. Also to the refusal and omission of the court to find the twelfth proposed conclusion of law submitted by these defendants.

Twenty-fourth. Also to the refusal and omission of the court to find the fourteenth proposed conclusion of law submitted by the defendants.

Twenty-fifth. Also to the refusal and omission of the court to find the fourteenth proposed conclusion of law submitted by these defendants.

Twenty-sixth. Also to the refusal and omission of the court to find the fifteenth proposed conclusion of law submitted by these defendants.

Twenty-seventh. Also to the omission of the court to find the sixth proposed finding of fact submitted by said defendants.

Twenty-eighth. Also to the omission of the court to find
814 the seventh proposed finding of fact submitted by these defendants.

Twenty-ninth. Also to the omission of the court to find the eighth proposed finding of fact submitted by said defendants.

Thirtieth. Said defendants also except to the decision of the court herein for that it did not direct judgment dismissing the complaint herein upon the merits, and that these defendants recover of the plaintiffs their costs and disbursements in this action.

Thirty-first. Defendants also except to the said decision for that it did not direct judgment in case it directed a sale under a judgment to be had in this action, that such sale be made subject to the rights of these defendants, holders of receiver's certificates, and that said certificates be paid to said certificate-holders first out of the proceeds of any sale that may be had herein.

HALE & BULKELEY,
Attorneys for the said Excepting Defendants.

The foregoing case contains all the evidence given on the trial of this action.

HALE & BULKELEY,
Attorneys for the Defendants, The Central National Bank of Boston, and Other Certificate-holders.

The foregoing case upon the appeal herein, is hereby settled by me. That portion of the evidence by question and answer is so ordered by me. And it is further ordered that the case, as settled and signed, be filed in the office of the clerk of the county of Rensselaer.

Dated Saratoga, April 5, 1892.

JOHN R. PUTNAM,
Justice Supreme Court.

815 Supreme Court.

AARON R. STEVENS and Others
against
THE UNION TRUST COMPANY OF NEW YORK and Others.

It is hereby stipulated that the foregoing are true copies of the case, judgment-roll and notice of appeal on file in the Rensselaer county clerk's office, and also that the annexed is a copy of the opinion of Mr. Justice Putnam, rendered upon the trial of this action.

Dated April 5, 1892.

HALE & BULKELEY,
Attorneys for Appellants.
CAMPBELL & PAIGE,
Attorneys for Respondents.

STEVENS and Others
against
UNION TRUST COMPANY and Others. } Opinion.

PUTNAM, *J.*:

A careful examination of the opinion of the general term (57 Hun., 499–515), leads to the conclusion that that court has disposed of this case, leaving nothing for me to do but direct judgment in pursuance of such opinion. Whatever my views might be I must, of course, be guided by the decision of the appellate court.

The case being important, I thought of writing an opinion
816 stating my views, but the opinion delivered at general term, covers the whole case and renders one by me unnecessary and improper.

Whatever the action may be called—whether a "bill of review" or otherwise—the general term has held it properly brought, and that the action is not barred by any laches of the plaintiff or any statute of limitations (57 Hun., 515). The court states (page 509): "A bill of review impeaching the action and judgment for fraud brings the fraudulent practices of the plaintiff or suffered by him in the action, whereby he wronged those he assumed to protect. Such is this action. It is a direct attack, not upon any alleged error of the court, but upon the fraud of the plaintiff."

The appellate court has also held that the "Sackett" action was not a representative one. The opinion of the general term was delivered on the reversal of the judgment of the special term of the law and facts.

The court remarked in reference to the finding of the special term: "The conviction is forced upon our minds that the finding cannot be sustained and that the findings requested by the plaintiff, namely, 'that said suit of Sackett against Root was neither brought nor conducted for the purpose of realizing the property to the owners of the Lebanon Springs bonds,' ought to have been made.

"Assuming that Sackett, and Tilden, his associate, in bringing and conducting the action contemplated the natural and probable consequence of their management of the action of Sackett *v.* Root, they cannot be acquitted of deliberate spoliation of the Lebanon Springs bondholders.

"What has already been said suggests the delicate and highly responsible trust which a representative plaintiff assumes in bringing such an action as Sackett brought. He impliedly guaranties that he will not allow his private interest to conflict with his
817 discharge of duty. Here we find Sackett and Tilden obtaining from the fund, which it was their duty to protect for the bondholders, $27,764.21 upon their private claims, which, if valid, were behind the bonds. No suggestion of these claims was made in the complaint. Presumably the other bondholders, if they had not kept out of the court by the plaintiffs' intrusion as their self-elected representative, would have opposed their priority." * * * "Not content to leave out of the action those who would have naturally

opposed these claims, they successfully opposed and kept out such of them as tried to come in. Under a pretense of protecting the common and general interest of the bondholders, Sackett and Tilden sacrificed them to their own interest. This was a fraud, and of itself is sufficient to establish the non-representative character of the action and its misrepresentative character. Sackett's omission to make the Union Trust Company, Park and Duncan and the trustees of the New York, Boston and Montreal Railway Company parties to the action is significant. When a party brings an action for himself he can select his own defendants, but when he volunteers to sue as the representative of others, he should sue those who ought to be sued.

"If the railroad was to be sold, the common interest of the bondholders required that all outstanding liens and clouds upon the title behind the bonds should be cut off, to the end that there should be no diminuties of price upon account thereof." * * *

"It would seem to follow that the action by one *cestui que trust.*, as the representative of all, is not proper where the trustee is alive and is not brought into court. He who seeks to procure the representation of all the bondholders should perform the condition precedent to such representation, namely, bring in as a party to the
818 proper action their legal representative, their trustee. Where the trustee is dead the *cestui que trust.*, through one or more as their representatives, can bring an action, since no trust shall fail for want of a trustee. (Galveston R. R. Co. *v.* Cowdrey, 11 Wall., 459.) It is plain that if the Union Trust Company is not cut off, and these plaintiffs are not cut off by the Sackett suit, then no bar exists to the present action. * * *

"Unless the plaintiffs can be held to have consented to the Sackett suit, then, whatever rights they could work out for themselves under the Union Trust Company's judgments, or the Park and Duncan mortgage, can be worked out in this action, since neither they nor the Union Trust Company nor Park and Duncan were parties to the Sackett action, and all necessary parties were made defendants in this action." * * * "Such an action, thus instituted, controlled and resulting, cannot be upheld. It was not a representative suit in fact; if it was such in form and regularity, then it is effectually impeached for fraud." * * *

The court further says to the receiver's certificates issued in the Sackett action: "As said in Union Trust Company *v.* Illinois Midland Company (117 U. S., 460), 'These who take receiver's certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property, and who have not, but should have been, brought before the court. While the court under some circumstances, and for some purposes, and in advance of the proper lienholders being made parties, may have jurisdiction to charge the property with the amount of the receiver's certificates issued by its authority, it cannot, without giving such parties their day in court, deprive them of their priority of lien. When
819 such prior lienholders are brought before the court they become entitled, upon the plainest principles of justice and

equity, to contest the necessity, validity, effect and amount of all such certificates, as fully as if such questions were then the first time presented for determination.'"

The new evidence given on the trial before me is not important. The material facts, upon which the general term based its decision remains unchanged, as will be seen by these parts of the opinion which I have quoted above.

Therefore, nothing remains for me but to direct judgment in pursuance of the holding of the general term. On the state of facts appearing on the first trial and which also appeared upon the trial, before me the appellate court determined that the Sackett suit was not a representative one and that the plaintiffs in this action were not bound by the judgment rendered in that suit and were entitled substantially to the relief asked for in their complaint. It is therefore my duty to direct a judgment in pursuance of such holding of the appellate court.

It follows that there should be a sale of the property described in the complaint. The proceeds of the sale after paying the costs of the action, should be brought into court. There should be a reference ordered to determine what bondholders assented to or acquiesced in the Sackett suit, and also as to what bondholders held aloof from the Sackett action and are not bound by the judgment and proceedings therein. The latter are entitled to receive their *pro rata* part of the proceeds of the sale to be made in pursuance of the judgment in this action, the same as if the Sackett suit had never been brought. The share of the proceeds of the sale which would otherwise have been received by the bondholders who acquiesced in the Sackett suit or took part therein, should be paid to those holding certificates issued in the Sackett suit to the extent of said certificates issued. The residue, if any, being payable to Hazard and Foster or their grantees, or rather as this court may hereafter decree.

820 At a general term of the supreme court held in and for the third judicial department at the city hall in Albany on the *on the* 9th day of May, 1893.

Present: Hon. Stephen L. Mayham, P. J.; Hon. D. Cady Herrick, J.

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, Andrew A. Douglas, as Trustee, etc., and Ida S. Harrison, Plaintiffs,

against

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and Others, Defendants.

An appeal from the judgment entered in Rensselaer county in this action on the 11th day of November, 1891, having been taken to the general term by the defendants, The Central National Bank of Boston, Peter Butler as receiver; The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther

K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, it is now after hearing Mr. Hale for the aforesaid appellants, and Mr. Paige for the respondents.

Ordered, that said judgment be and is in all things affirmed with costs.

JAMES D. WALSH, *Clerk.*

Filed in Rensselaer county.

JAS. D. WALSH, *Clerk.*

821 Supreme Court.

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, Andrew A. Douglas, as Trustee, and Ida S. Harrison, Plaintiffs,

against

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and Others, Defendants.

An appeal having been taken to the general term of the supreme court by the defendants, The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, from the judgment entered in this action in Rensselaer county on the 11th day of November, 1891, and amended on the 5th day of April, 1892, to the general term of the supreme court, and the said appeal having been heard by the court, and the court having rendered its decision at a general term held in and for the third judicial department, in the city of Albany, on the 9th day of May, 1893, affirming said judgment with costs and the costs having been adjusted at $155.20—

It is now, on motion of Campbell & Paige, attorneys for plaintiffs—

Adjudged, that said judgment be and the same is hereby affirmed, and that the plaintiffs recover of the defendants appellants the sum of $155.20.

822 Supreme Court.

AARON R. STEVENS and Others, Plaintiffs, Respondents,

against

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and Others, Defendants, Appellants.

GENTLEMEN: Take notice that the defendants, appellants, The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston, and the other certificate-holders named as defendants in the above-entitled action, hereby appeal to the court of ap-

peals of the State of New York from the judgment of the general term of the supreme court herein, entered in the clerk's office of the county of Rensselaer, on the 25th day of May, 1893, affirming a judgment of this court entered in said clerk's office on the 11th day of November, 1891, and for $155.20 costs, and from each and every part thereof.

Dated July 26, 1893.

Yours, etc.,

HALE & BULKELEY,
Attorneys for Appellants.

Office and post-office address, 25 North Pearl street, Albany, N. Y.

To the clerk of the county of Rensselaer, and to Campbell & Paige, Esqs., attorneys for respondents.

823 Supreme Court.

AARON R. STEVENS and Others, Plaintiffs, Respondents,
against
THE UNION TRUST COMPANY OF NEW YORK and Others, Defendants, Appellants.

We, the undersigned, attorneys for the respective parties to the foregoing-entitled action, do hereby certify, pursuant to the code of civil procedure, the foregoing notices of appeal, judgment-roll and other papers are correct copies of the originals thereof now on file in the clerk's office of Rensselaer county, and the certificate of the clerk of Rensselaer county is hereby waived.

Dated July 25, 1893.

CAMPBELL & PAIGE,
Respondents' Attorneys.
HALE & BULKELEY,
Attorneys for Appellants.

Supreme Court.

AARON R. STEVENS and Others, Respondents,
against
THE CENTRAL NATIONAL BANK OF BOSTON and Other Certificate-holders, Appellants, Impleaded with Others.

MEM. BY HERRICK, J.—This case has been once before this court (57 Hun., 499) upon substantially the same facts. Upon the new trial, the court, in its decision, followed the judgment and opinion of the general term, and I can see no reason for differing from that decision. The judgment appealed from should be affirmed, with costs.

Mayham, P. J., concurred; Putnam, J., not acting.

824 In the Court of Appeals of New York.

AARON R. STEVENS, IDA S. HARRISON, and Others, Respondents,
against
THE UNION TRUST COMPANY and Others and THE CENTRAL NATIONAL BANK OF BOSTON and Others, Appellants.

Papers on Motion to Dismiss or Affirm.

Campbell & Paige, attorneys for plaintiffs, respondents.
Edward Winslow Paige, attorney for Lebanon Springs railroad.
Hale, Bulkeley & Tennant, attorneys for appellants.

825 In the Court of Appeals of New York.

Court of Appeals.

AARON R. STEVENS, IDA S. HARRISON, and Others, Respondents,
against
THE UNION TRUST COMPANY and Others and THE CENTRAL NATIONAL BANK OF BOSTON and Others, Appellants.

Stipulated that the motion noticed as within be heard with the appeal in the same case.

HALE, BULKELEY & TENNANT,
Attorneys for Appellants.
CAMPBELL & PAIGE,
Attorneys for the Plaintiffs.
EDWARD WINSLOW PAIGE,
Attorney for Lebanon Springs Railroad for this Motion.

826 Court of Appeals.

AARON R. STEVENS and Others
against
THE UNION TRUST COMPANY OF NEW YORK and Others.

SIRS: You will take notice that on behalf of the plaintiffs in the above action, and the Lebanon Springs railroad, we will move the court of appeals at the capitol in the city of Albany, on the fourteenth of June, 1894, that the appeals in the above action be dismissed and the judgment therein be affirmed, and for such other and further relief as to the court shall seem just. That such motion will be made upon the deed of William Foster, Jr., and wife, to the Lebanon Springs railroad, the resolution of the directors of that company and the stipulation and consent of that company, copies of which are hereto annexed, and also upon the deed of Worthington Frothingham, referee, to William Foster, Jr., and the appeal book in the action, copies of both of which are in your possession.

CAMPBELL & PAIGE,
Attorneys for Plaintiffs, 44 Cedar Street, N. Y.
EDWARD WINSLOW PAIGE,
Attorney for L. S. R. R. for this Motion.

To Messrs. Hale, Bulkeley & Tennant, attorneys for Central National bank and others.

It being suggested that the appeal in Stevens against Union Trust Company and others, of the Central National Bank of Boston and others, holders of certificates issued by Van Valkenburgh, when receiver, will shortly be reached in the court of appeals; and it also being suggested that this company owns all the interest of those appellants by virtue of the deed of Worthington Frothingham,
Esq., master *pro hac vice* appointed by the circuit court of
827 the United States, to William Foster, Jr., and the deed of
William Foster, Jr., and wife, to this company.

Resolved, That the judgment in that action be affirmed; that the pending appeals be withdrawn; that the president execute in the name of the company, a stipulation and consent to the plaintiffs for the affirmance of the judgments and the withdrawal of the appeals, and to that end that the president employ and direct counsel for and in the name of the company to consent to and assist in any motion which may be made by the plaintiffs for the dismissal of the appeal and the affirmance of the judgment.

I certify that the above is a copy of resolution of the board of directors of the Lebanon Springs railroad, and that the same was unanimously passed at a special meeting called pursuant to the by-laws, and held in the city of New York on the twenty-fourth of April, 1894.

WILLIAM V. REYNOLDS, *President.*

The Lebanon Springs railroad does hereby consent and stipulate that the judgment in the action of Aaron R. Stevens and others, against The Union Trust Company and others, from which appeals are now pending in the court of appeals, be affirmed; and that the appeals pending therein be withdrawn.

New York, April 24th, 1894.

THE LEBANON SPRINGS RAILROAD,
By WILLIAM V. REYNOLDS, *President.*

This indenture, made this ninth day of June, one thousand eight hundred and ninety-three, between William Foster, Jr., and Caroline M. Foster, his wife, both of the city of New York, of the first part, and the Lebanon Springs railroad, of the second part, witnesses as follows:

That the said parties of the first part in consideration of a
828 plan of agreement for the readjustment of the interests of the
creditors and stockholders of the Lebanon Springs Railroad Company and its successors, made the fourteenth day of May, 1892, and also in consideration of one dollar to them paid by the Lebanon Springs railroad, the receipt of which is hereby acknowledged, have bargained, sold, and by these presents do grant and convey unto the said party of the second part and its successors and assigns forever, all the premises, property, franchises and powers described as follows, to wit:

All the franchises and powers conferred upon the Lebanon Springs Railroad Company by the following acts of the legislature of New

York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont, and to provide means therefor," passed March 8th, 1853, and being chapter 25 of the laws of that year.

"An act to amend an act entitled 'An act to authorize the Lebanon Springs Railroad Company to construct an extension of its road into Massachusetts and Vermont and to provide means therefor,' passed March 8th, 1853," passed June 24th, 1854, and being chapter 461 of the laws of that year.

"An act to enable certain connecting railroad companies to aid in the construction of the Lebanon Springs railroad," passed April 12th, 1855, and being chapter 350 of the laws of that year.

"An act to extend the time for the completion of the Lebanon Springs railroad," passed March 23d, 1857, being chapter 150 of the laws of that year.

"An act to extend the time for the completion of the Lebanon Springs railroad," passed April 12th, 1860, and being chapter 285 of the laws of that year.

"An act to extend the time for the completion of the Lebanon Springs railroad," passed April 22d, 1862, and being chapter 444 of the laws of that year.

"An act to amend the charter of the Lebanon Springs Rail-
829 road Company," passed April 9th, 1864, and being chapter 145 of the laws of that year.

"An act to authorize any town in the counties of Columbia or Rensselaer to aid in the completion of the Lebanon Springs railroad," passed April 4th, 1866, and being chapter 373 of the laws of that year.

"An act to extend the time for the completion of the Lebanon Springs railroad," passed 26th February, 1867, and being chapter 46 of the laws of that year.

And all the powers and franchises of railroad corporations stated in "An act to authorize the formation of railroad companies, and to regulate the same," passed by the legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto and the powers to purchase, construct and operate the railroad hereinafter described, extending from Chatham Four Corners, in the county of Columbia, northerly through the counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also the certain other special and particular powers and franchises stated in the above acts, and also the following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the management of the business thereof, which might be done if that part were within the State of New York.

To create preferred stock at such rate of dividend, or interest, and with such securities therefor as may be deemed expedient.

To extend the road by construction or purchase, into the States of Vermont or Massachusetts, as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate either alone or after consolidation with any other company into a single corporation, with any company having a railroad, which, or a portion of which should be within the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in "An act to authorize the consolidation of certain railroad companies," passed by the legislature of New York, April 2d, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which might be constructed or acquired within the States of Vermont and Massachusetts as may be exercised if the same were wholly within the State of New York.

To have corporate stock and bonds taken and owned or guaranteed by any company having or being authorized to construct a railroad connecting with the lines of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of the railroad from the Massachusetts State line as declared in the articles of association of the Lebanon Springs Railroad Company to any point within the town of Hoosick, in the county of Rensselaer, or the town of White Creek, in the county of Washington.

To construct a branch to a terminus at the Vermont State line, at a point of junction with the Western Vermont railroad, now known as the Bennington and Rutland railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same effects as if the line had been originally fixed in the articles of association both as to the main line and branches as the same are last above described, and the terminal thereof had been its original terminus.

Also all powers and franchises conferred by the following acts, which were duly passed by the legislature of the State of Vermont, to wit:

"An act to incorporate the Vermont and New York Railroad Company," approved November 2d, 1865, and being No. 134 of the laws of that year.

"An act to amend an act entitled 'An act to incorporate the Vermont and New York Railroad Company,' approved November 2d, 1865," approved November 19th, 1866, and being No. 167 of the laws of that year.

"An act authorizing the Bennington and Rutland Railroad Company to consolidate their road with the road of the Lebanon Springs Railroad Company," approved November 21st, 1867, and being No. 155 of the laws of that year.

"An act to enable the Bennington and Rutland Railroad Company to aid in obtaining necessary railroad connections," approved March 28th, 1867, and being No. 2 of the special sessions of that year.

And the powers and franchises of railroad corporations under the laws of Vermont, and the powers and franchises to build, own and operate a railroad from Bennington to the Vermont State line, being that portion of the railroad hereinafter described, which is in the State of Vermont, and to transfer and convey such powers and franchises and any property, and to consolidate with railroad companies.

And also the following-described property, to wit:

All and singular the tracks or roadway of the Lebanon Springs railroad, from Chatham Four Corners, in the county of Columbia, to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said Lebanon Springs Railroad
832 Company already built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same, and of all of the above-mentioned powers and franchises; and also all the rolling stock, locomotives, tenders, snow-plows, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description. All the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York railroad constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above-mentioned powers and franchises of the said Vermont and New York Railroad Company, belonging to or in anywise appertaining to, or which may at any time belong to or appertain to, or have belonged to or appertained to the same or either of said railroads or companies, as well in law as in equity; including also all property of every kind, name or nature of, or purchased by or now or heretofore in the possession of the Lebanon Springs Railroad Company, either of the corporations called the Harlem Extension Railroad Company, the Vermont and New York Railroad Company, John W. Van Valkenburgh, as receiver, the New York, Rutland and Montreal Railway Company, and William V. Reynolds, as receiver; and including also all property, powers and franchises of every name and nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867, or

of the mortgage executed by the Harlem Extension Railroad Company, and bearing date first of April, 1870; and also all property of every name and nature described in or subject to the lien of the mortgage executed by the New York, Rutland and Montreal Railway Company to the American Loan and Trust Company.

And also all the property described in the certain mortgage
833 made by James C. Hull and wife and Charles G. Lincoln, to William Butler Duncan and Trenor W. Park, which said mortgage bears date the twenty-eighth of January, 1873, was made to secure the payment of five millions of dollars and interest and was recorded in Rensselaer county clerk's office, February 14th, 1873, in Book No. 137 of Mortgage, page 344; and also recorded in Bennington county clerk's office, Vermont, May 1st, 1873, at 4 hours, 30 minutes, p. m.

And also all the premises, property, franchises and powers conveyed to the said William Foster, Jr., party of the first part, by either of the following deeds, that is to say:

1. A deed made to the said William Foster, Jr., by John L. Henning, referee, appointed by judgment of the supreme court of New York, entered in Rensselaer county, eleventh of November, 1891, and amended fifth of April, 1892, in an action in which Aaron R. Stevens and others were plaintiffs, and The Union Trust Company of New York and others, were defendants. Said deed bears date the sixteenth day of May, 1892, and was acknowledged on the twenty-eighth of May, 1892.

2. A deed made to the said William Foster, Jr., by the New York, Boston and Montreal Railway Company, bearing date the seventeenth day of May, 1892, and acknowledged the twenty-seventh day of May, 1892.

3. A deed made to the said William Foster, Jr., by William Butler Duncan, and by John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, bearing date the seventeenth day of May, 1892, and acknowledged the fifth of January, 1893, and the sixth of April, 1893.

4. A deed made to the said William Foster, Jr., by Worthington Frothingham, as referee, appointed by a decree of the circuit court of the United States for the northern district of New York, passed twenty-fourth March, 1887, in an action in equity in which The Central National Bank of Boston was complainant and Rowland N. Hazard and others were defendants. Said deed bears date
834 the twenty-fifth day of April, 1892, and was acknowledged on the twenty-seventh day of April, 1892.

To have and to hold all and singular the premises, property, franchises and powers above mentioned and described, unto the said party of the second part, its successors and assigns, forever.

In witness whereof, the parties of the first part have hereunto set their hands and seals, the day and year first above written.

WM. FOSTER, JR.
CAROLINE M. FOSTER.

Signed, sealed and delivered in presence of—
GEORGE W. OAKLEY.

STATE OF NEW YORK, }
City and County of New York, } ss:

On this 9th day of June, 1893, before me personally came, William Foster, Jr., and Caroline M. Foster, his wife, known to me and to me known to be the persons described in and who severally acknowledged to me that they executed the within instrument.

GEORGE W. OAKLEY,
Commissioner of Deeds, City and County of New York.

Deed.

This indenture made this twenty-fifth day of April, in the year of our Lord, one thousand eight hundred and ninety-two, between Worthington Frothingham, of Albany, N. Y., referee in the action hereinafter mentioned, of the first part, and William Foster, Jr., of the city, county and State of New York, of the second part.

Whereas, at a special term of the circuit court of the United States, held in and for the northern district of New York, at the chambers of the circuit judge in the city of Syracuse on the 24th day of March, 1887, it was among other things, ordered, ad-
835 judged and decreed by the said court in a certain action then pending in the said court between The Central National Bank of Boston, which sues as well for itself as for all others similarly situated, plaintiff, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York, defendants, that all and singular the premises, franchises, and property mentioned in the complaint in said action, and hereinafter described and in said decree described, or so much thereof as might be sufficient to satisfy the amount due and unpaid on the receiver's certificates mentioned in the complaint in said action, and expenses of sale, and the costs of this suit, and which might be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said northern district of New York, according to the course and practice of said court, by or under the direction of the said Worthington Frothingham, who was appointed a referee in said action, and to whom it was referred by the said decree of the said court, among other things, to make such sale; that the said sale be made in the county where the said premises, franchises, and property, or the greater part thereof, are situated; that the said referee give public notice of the time and place of such sale, according to law and the rules and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee execute to the purchaser or purchasers of the said premises, franchises, and property, or such part or parts thereof as shall be sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas the said referee, in pursuance of the said decree of the said court, did, on the 23d day of March, one thousand eight hundred and ninety-two, sell at public auction, at two o'clock in

the afternoon of that day, at the outer westerly door of the court-house, in the city of Troy, county of Rensselaer, and State of New York, the premises, franchises, and property in said decree mentioned, due notice of the time and place of such sale being
836 first given, agreeably to the said decree; at which sale the premises, franchises, and property hereinafter described were struck off to the said party of the second part for the sum of seven thousand five hundred dollars, that being the highest sum bid for the same.

Now this indenture witnesseth, that the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the decree of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part, the premises, franchises, and property directed by said decree to be sold, and described therein as follows: The premises and property described as contained in a certain mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by a deed executed by George McClellen, referee, to William Foster, Jr., and Rowland N. Hazard, as follows: "All the right, title, and interest of the said party of the first part (said Lebanon Springs Railroad Company) of, in, and to all and singular the track or roadway of the party of the first part, from the Chatham Four Corners in the county of Columbia to the east line of the State of New York, in the town of Hoosick, in the county of Rensselaer, and all lands thereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said party of the first part now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings, and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues, and profits and alienable franchise of the said party of the first part, connected with said railroad, or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow-ploughs, and scrapers, and all the passenger cars, baggage, mail, and express cars, freight, stock, and dumping cars, flat cars and cars of every description; all
837 the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars, now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be sold therewith, and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Benning-

ton, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York railroad, belonging or in anywise appertaining, or which may at any time belong or appertain to the same as well in law as in equity."

To have and to hold all and singular the premises, franchises and property above mentioned and described and hereby conveyed unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part, referee as aforesaid, hath hereunto set his hand and seal the day and year first above written.

WORTHINGTON FROTHINGHAM, *Referee.* [SEAL.]

In presence of—
WM. S. BEERS.

838 STATE OF NEW Y[illegible], } ss:
City and County of A[illegible]ny, }

On this 27th day of April, in the year one thousand eight hundred and ninety-two, before me, the subscriber, personally came Worthington Frothingham, referee, to me known to be the person described in and who executed the within instrument, and duly acknowledged that he executed the same.

WM. S. BEERS,
[SEAL.] *Notary Public, Albany Co., N. Y.*

STATE OF NEW YORK, } ss:
City and County of Albany, Clerk's Office, }

I, Ansel C. Requa, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify, that Wm. S. Beers, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument in writing, and endorsed thereon, was at the time of taking such proof or acknowledgment, a notary public, in and for the county aforesaid, dwelling in the said county, and duly authorized to take the same; and that I am well acquainted with the handwriting of the said notary and verily believe that the signature to the said certificate or proof of acknowledgment is genuine; and that the said instrument is executed and acknowledged according to the laws of the State of New York.

In witness whereof, I have hereunto set my hand and affixed my official seal as county clerk of said courts, this 27th day of April, 1892.

[SEAL.] A. C. REQUA, *Clerk.*

839 Court of Appeals.

AARON R. STEVENS and Others, Respondents,
against
THE CENTRAL NATIONAL BANK OF BOSTON and Other Defendants, Holders of Receiver's Certificates, Impleaded, &c., Appellants.

CITY AND COUNTY OF ALBANY, *ss:*

Alpheus T. Bulkeley, being duly sworn, says that he is one of the attorneys for the appellants in the above-entitled action. Deponent further says that after the rendition of the judgment in the above-entitled action William Foster, Jr., one of the defendants in said action, brought another action in the N. Y. supreme court against the said Central National Bank of Boston and other defendants, including the certificate-holders who are defendants in this action, in which the prayer of the complaint was, among other things, that as to so much of the decree of the circuit court of the United States dated March 24, 1887, as orders, adjudges, or decrees that plaintiff, said William Foster, Jr., either alone or with Rowland N. Hazard, pay to the said Central National Bank of Boston and to the other of said certificate-holders or either or any of them the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds thereof, the plaintiff is entitled to have the same annulled and the enforcement thereof perpetually enjoined, and that as to so much of the decree of the said United States circuit court
840 as adjudges that the said Central National Bank of Boston and other certificate-holders have execution for the residue or any part of said indebtedness, the plaintiff is entitled to have the same annulled and the enforcement thereof perpetually enjoined, and that it be adjudged that the defendants and each of them, their attorneys, counsel, &c., be perpetually restrained and enjoined from issuing any execution against the plaintiff or his property or any part thereof under the said decree of the circuit court of the United States, or taking proceedings in the said court or otherwise for the purpose of enforcing payment or collection of the said certificates or any of them or any part of the same, and that defendants be enjoined from permitting or suffering any such execution to be issued or any such proceeding to be taken in the names of them or any of them or on their behalf, and that it be adjudged that the said Central National bank and the said certificate-holders and each of them execute on the demand of the plaintiff and deliver to him, duly proved or acknowledged, so as to admit to record, a proper release or satisfaction of the said decree in so far as it requires the plaintiff, the said William Foster, Jr., to make any payment to the Central National bank and to the other of said certificate-holders or directs that the said bank and the other certificate-holders have execution against the plaintiff or his property or any part thereof.

The complaint of the said William Foster, Jr., plaintiff in said action, sets forth, among other things, the judgment in this action,

from which an appeal to the New York court of appeals is
841 now pending, a copy of which is annexed to his complaint as Exhibit B and made a part of said complaint; and the complain-t bases his claim for the relief asked for in said complaint upon the said judgment in this action. In said action in which said Foster was plaintiff Mr. Justice Putnam granted a temporary injunction enjoining and restraining the said Central National Bank of Boston and the other certificate-holders, defendants in said action, from issuing execution upon the said decree of the circuit court of the United States for the purpose of enforcing the payment or collection of any of said certificates of indebtedness. The said Central National Bank of Boston, one of the defendants in said action, afterwards filed its petition under the laws of the United States, and the said action was removed into the circuit court of the United States for the northern district of New York, and since said removal the said circuit court of the United States has vacated the injunction therein granted by Mr. Justice Putnam and the said action is now pending and undetermined in the said circuit court of the United States.

Deponent further says that the said Central National Bank of Boston, in its answer in said action, wherein the said William Foster, Jr., is plaintiff, now pending in the circuit court of the United States, sets up and claims that the supreme court of the State of New York did not have and has not jurisdiction and power to deprive said defendant and the other certificate-holders represented by it in that suit of the benefit of said decree rendered by the circuit court of the United States or any part thereof or any remedies to which it and the other certificate-holders are entitled under the rules and
842 practice of said circuit court of the United States, and hereby refers to the answer in said action.

Deponent further says upon information and belief that it is contended and claimed by the counsel for the said Foster in said action that the sale of the premises described in the complaint under the said decree in the United States circuit court is void for the reason that the same was made in disobedience to the said injunction contained in the judgment in this action, and that one of the grounds upon which said William Foster, Jr., is in said action seeking to perpetually enjoin the said Central National Bank of Boston and the other certificate-holders, defendants in said action, from issuing execution against him is that the said sale of said premises was void for the reason above stated, and that therefore the said Central National Bank of Boston had no right to issue execution against the said Foster, said right under said decree being dependent upon a legal and valid sale having taken place of the premises described in the bill of complaint in the said suit wherein the said Central National Bank of Boston was complainant and the said William Foster, Jr., and others were defendants.

Deponent further says upon information and belief that it is important for the interests of the said The Central National Bank of Boston and the other certificate-holders, appellants in this action, in view of the suit now pending in the circuit court of the United

States wherein said William Foster, Jr., is plaintiff, to carry on and prosecute the appeal from the judgment in this action.

843 Deponent further says that proceedings have been instituted in the supreme court of this State against one of the appellants herein upon an application to punish him for contempt in not obeying the provisions of the said judgment in this action enjoining the defendants certificate-holders from procuring or suffering a sale of said premises to take place, which application has never been decided so far as deponent has learned, but is still pending before the special term of said supreme court.

Deponent further says that William V. Reynolds, whose name is attached to the so-called consent and stipulation appended to the notice of motion to dismiss the appeal herein, was at the time of the commencement of this action, on the motion of Mr. Paige, counsel and one of the attorneys for plaintiffs, appointed receiver of the Lebanon Springs Railroad Company in this action, and has ever since, as deponent is informed and believes, been in possession of the railroad premises described in the complaint, either as such receiver or as the agent of William Foster, Jr., and has been during all said period in the interest of the plaintiffs or of the attorneys and counsel for plaintiffs and acting in conformity with their wishes; and deponent says upon information and belief that the resolution and consent referred to in the notice of motion have been adopted and executed by the direction and in the interest of the plaintiffs or the attorneys for plaintiffs, and also in the interest and for the benefit of the defendant William Foster, Jr.

ALPHEUS T. BULKELEY.

Sworn to before me this 20th day of October, 1894.

WM. S. BEERS,
Notary Public, Albany Co., N. Y.

844 [Endorsed:] Court of appeals. Aaron R. Stevens and others, resp'd'ts, against The Central National Bank of Boston and others, impleaded, &c., app'l'ts. Copy. Affidavit to oppose motion to dismiss appeal. Hale, Bulkeley & Tennant, attorneys for app'l'ts, 25 North Pearl street, Albany, N. Y.

845 In November Term of the Court of Appeals of the State of New York.

On the 27th day of November, 1894, judgment was duly given and rendered in and by said court of appeals whereby the said judgment of the said supreme court was in all things affirmed with costs.

The following is the opinion delivered in the court of appeals of the State of New York:

846 AARON R. STEVENS *et al.*, Respondents,
v.
THE CENTRAL NATIONAL BANK OF BOSTON and Other Certificate Holders, Impleaded, etc., Appellants.

(Decided November 27, 1894.)

Matthew Hale, for appellants.
Edward Winslow Paige, for respondents.

BARTLETT, *J.:*

This appeal involves a contest between the bondholders and holders of receiver's certificates of the Lebanon Springs Railroad Company and its successor, the Harlem Extension Railroad Company.

A recital of the main facts in this litigation is essential as it will present clearly the questions of law submitted for our determination.

The Lebanon Springs Railroad Company, in 1869, was operating its completed road from Chatham, New York, to Bennington, Vermont; prior to that time, in July, 1867, it issued and sold its bonds to the amount of two millions of dollars, and secured the same by mortgage to the Union Trust Company of New York, in trust, covering its property, rights and franchises.

Early in the year 1870, the Lebanon Springs Railroad Company consolidated with the Bennington and Rutland Railroad Company, of Vermont, and the new corporation took the name of the Harlem Extension Railroad Company.

This latter company in April, 1870, made its mortgage to the Union Trust Company of New York, in trust, to secure the payment of four millions of dollars of its bonds, but only one million four hundred thousand dollars of this issue were negotiated.

In February, 1872, the Union Trust Company began the foreclosure of the first-named mortgage in the supreme court of New York, and later in the same year it filed bills in the court of chancery in Vermont to foreclose both mortgages in that jurisdiction.

In December, 1872, and while the suits mentioned were pending, the Harlem Extension Railroad Company consolidated with corporations, not material to mention in this connection, and assumed the name of the New York, Boston and Montreal Railway Company.

In January, 1873, the property covered by the two million mortgage in this State was sold and conveyed, in the Union Trust Company foreclosure suit, to James C. Hull, a clerk in the office of defendant William Butler Duncan, for the nominal sum of one hundred thousand dollars, and about the same time there were sales under the Vermont decrees and conveyances executed to Charles G. Lincoln, a clerk for one Trenor W. Park, for the nominal sum of fifty thousand dollars.

It is found in this action that the Union Trust Company never did anything to enforce the payment of these bids, and that they were never paid.

On the 28th of January, 1873, Hull and Lincoln, without any

consideration, executed to the defendant William Butler Dun-
847 can and one Trenor W. Park a bond for the payment of five millions of dollars, secured by mortgage covering the property conveyed to them under the foreclosure sales in New York and Vermont.

It is found in this action that both Duncan and Park knew that the consideration for the deeds to Hull and Lincoln remained unpaid. On the 30th of January, 1873, Hull and Lincoln conveyed the property without consideration, and subject to the Duncan and Park mortgage, to the New York, Boston and Montreal Railway Company.

The five-million-dollar mortgage made to Duncan and Park represented substantially the aggregate indebtedness which the New York, Boston and Montreal Railway Company was to assume under the consolidation and other agreements.

The latter company paid to Duncan and Park $807,077.05 on account of the money due on said mortgage, but failed to pay the balance, became insolvent, and, in April, 1875, Daniel Butterfield was appointed, by the supreme court of the State of New York, receiver of all its property and effects.

During the year 1873 the New York, Boston and Montreal Railway Company executed to Seligman, Sherman and Brown a mortgage to secure bonds to the aggregate amount of twelve millions two hundred and fifty thousand dollars; also another mortgage to the New York Loan and Indemnity Company to secure the payment of additional bonds to the aggregate amount of twelve millions seven hundred and fifty thousand dollars.

A sufficient amount of these bonds were sold in Europe to realize six millions of dollars.

In November, 1873, the New York, Boston and Montreal Railway Company leased its road to the Central Vermont Railway Company, which lease was operated until August 20th, 1877, when it was abandoned.

In the meantime the lessor company had become insolvent, as already stated, and in September, 1877, one Russell C. Root took possession of the property without legal right, and, subsequently, on November 27th, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company.

Root, in the name of this company, and as its president, continued to operate the road until possession was taken from him by the court, as will presently appear.

In September, 1880, one Marvin Sackett, a bondholder of the Lebanon Springs Railroad Company, brought an action in the supreme court of New York against Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company, and Daniel Butterfield as its receiver. Sackett alleged in his complaint that he brought the action "in behalf of himself and all other bondholders of the Lebanon Springs Railroad Company, similarly situated, who hold any of the two millions of dollars of the bonds of the Lebanon

Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit."

The complaint further alleged the mortgage to secure plaintiff's bonds to the Union Trust Company of New York, the
848 action to foreclose, the sale thereunder, and the non-payment of the purchase-money to the trustee.

In brief, the Sackett suit was ostensibly a representative action for the benefit of bondholders, and sought, apparently, to charge Duncan and his clerk, Hull, who took title at the foreclosure sale in this State, as trustees for the bondholders. The complaint further prayed for a receiver, a sale of the property, that all titles under the foreclosure sale should be declared void, and for such other relief as was just.

It will be observed that while the Sackett suit professed to seek the objects indicated, that it failed to bring before the court the necessary parties to render such a decree as was prayed for binding, viz: The Union Trust Company of New York, Duncan, Park, Hull, Lincoln, and the trustees under the mortgages.

The record in the Sackett suit also discloses some other remarkable features.

In October, 1880, John Van Valkenburgh was appointed receiver. Intermediate the appointment of the receiver and Feb. 1st, 1881, holders of large amounts of both Lebanon Springs and Harlem Extension bonds petitioned the court in two separate proceedings to be made parties to the action, but both applications were denied. After the denial of these motions and in Feb., 1881, the receiver petitioned for instructions, and suggested that he issue certificates to be made a first lien for, among other things, the "settlement of unavoidable indebtedness of the company now existing." April 2d, 1881, after the coming in of the report of an expert to examine the railroad, and no one appearing except the receiver's counsel, the receiver was ordered to issue certificates of indebtedness to the amount of $350,000, and a referee was appointed "to hear and determine all existing claims against said Lebanon Springs Railroad Company." The receiver had previously borrowed twenty-five thousand dollars without authority of the court. The disposition made of a portion of the proceeds realized by the sale of the receiver's certificates will be considered later.

The Sackett suit did not reach final judgment until January, 1885, after a delay of between four and five years. Later in 1885 the referee under the judgment sold the property to William Foster, Jr., for $155,000.

The action at bar was begun in the supreme court of New York, April, 1887, by bondholders owning bonds of both the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company.

The complaint brings in all the parties in interest; it seeks to enforce the foreclosure judgments and decrees of 1872 in the suits instituted by the Union Trust Company of New York both in Vermont and this State; it is also in the nature of a bill of review of the judgment in the Sackett suit and a bill for relief against the

judgment and proceedings in that suit as fraudulent; it also seeks the foreclosure of all junior liens.

The special term on Nov. 10th, 1891, rendered a judgment
849 for the plaintiffs in this action, a sale of the property was made by the referee, and on the 16th of May, 1892, William Foster, Jr., received a deed as purchaser.

This judgment was affirmed by the general term of the third department.

It now becomes necessary to consider the manner in which this appeal is presented.

In 1886, and before the case at bar was begun, one of the defendants in this action, The Central National Bank of Boston, on behalf of itself and all other holders of the receiver's certificates issued under the judgment in the Sackett suit, brought an action in the supreme court of New York against Foster and Hazard, the purchasers under the Sackett judgment and a corporation called the New York, Rutland and Montreal Railway Company, their grantee. The complaint in this action recited in detail the proceedings in the Sackett suit which led to the issuing of receiver's certificates, alleged that the Central National Bank of Boston held two hundred and fifty thousand dollars par value of the same, and that the balance of certificates were owned by divers persons and corporations.

It was also alleged that Hazard and Foster, when purchasing under the Sackett judgment, had assumed and agreed to pay the amount of unpaid principal and interest on said certificates of indebtedness after application of the purchase-money.

It prayed that the certificates be declared a first lien on the property; that a receiver be appointed, property sold and Hazard and Foster adjudged to pay deficiency. This suit was removed into the United States circuit court on petition of the defendants on ground of citizenship of parties.

On the 24th of March, 1887, a decree was entered in favor of plaintiffs and a sale of the property ordered.

Within thirty days after the entry of this decree the action at bar was begun and proceeded to judgment before sale under the Federal decree, which did not take place until 1892.

The defendants appealing from the judgment in the action at bar are the certificate-holders, and the only questions presented are on their behalf.

It is urged by the learned counsel for the appellants that the judgment appealed from is erroneous in perpetually enjoining the appellants from proceeding with the sale of the premises under the decree of the circuit court of the United States; also, in authorizing the referee to determine who were the owners of receiver's certificates; also, on the merits, and that the motion to dismiss the complaint should have been granted.

The appellants' counsel insists that this case presents a conflict of jurisdiction between the State and Federal courts, and that the injunction clause of the judgment which perpetually enjoined and restrained the Central National Bank of Boston and other certificate-holders from proceeding with the sale under the United States cir-

cuit court decree was an unlawful interference with the due and orderly procedure of a suit in which the Federal court had first acquired jurisdiction of the subject-matter. We have been
850 cited to many cases in the State and United States courts dealing with this question of concurrent jurisdiction and declaring well-settled principles that govern the procedure under such circumstances.

We do not consider that such a question is presented in this case, but are of opinion, assuming that the Sackett suit is fraudulent, that it was competent for the supreme court of New York in the action at bar to bring before it all the parties in interest and to review the judgment in the Sackett suit, to vacate it as fraudulent and to deal as a court of equity with the holders of the receiver's certificates issued under the Sackett judgment. It must be admitted that the United States circuit court had jurisdiction of the subject-matter in the suit referred to, and that its decree was proper and binding upon the parties before it.

There is nothing in the judgment at bar that attacks the jurisdiction of the United States circuit court or questions the legality of its decree.

The suit in the United States circuit court was founded upon the judgment and orders in the Sackett suit, and sought as against the defendants therein to enforce their provisions and to secure to the certificate-holders those rights as to priority of lien and personal judgment against Hazard and Foster, to which the Sackett judgment entitled them.

It was after the decree of the United States circuit court was rendered that the supreme court of New York, sitting as a court of equity, assumed jurisdiction of all the parties connected with this long and complicated contest, and undertook to adjust their rights and interests.

In so doing it rendered its judgment reviewing and reversing the Sackett judgment, setting aside the sale and referee's deed to Hazard and Foster under it, and enjoining the certificate-holders from proceeding with the sale under the United States circuit court decree.

It is thus apparent that if a court of equity, having jurisdiction of all the parties, was to give complete relief in dealing with the entire subject-matter, it must restrain the certificate-holders from proceeding with the sale under the decree of the United States circuit court, as the foundations of that suit had been utterly swept away by the judgment in the action at bar. Unless this power existed in the supreme court of the State of New York it was powerless to adjust the conflicting interests submitted for its consideration.

We think it is clear, both upon principle and authority, that this power did exist, and that the sale under the decree of the United States circuit court was without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar. The setting aside of the judgment in the Sackett suit, upon which the suit in the United States circuit court was founded, for fraud was a new fact occurring since the decree in

that court which gave jurisdiction in this action to enjoin proceedings thereon.

Judge Story (2 Eq. Ju., § 899, 13th ed.) uses this language in regard to foreign courts, but it is equally applicable to State and Federal courts, viz.:

"Although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted
851 authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit.

"In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction.

"They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties and decree *in personam* according to those equities and enforce obedience to their decrees by process *in personam*."

This is the acknowledged rule in England and this country.

In the case of Barry *v.* Brune, reported below in 8 Hun., 395, and affirmed by this court (71 N. Y., 262), this rule was acted upon, and the supreme court of this State enjoined the parties before it from collecting a judgment recovered in the United States circuit court for the district of Maryland. (See also, Mead *v.* Merritt, 2 Paige, 404; Dehon *v.* Foster, 4 Allen, 550; Savage *v.* Allen, 54 N. Y., 458; Harlem R. R. *v.* Haws, 56 *id.*, 175; N. Y. & N. H. R. R. Co. *v.* Schuyler, 17 How., 464, 468; Carron Iron Co. *v.* McClaren, 5 H. L. C., 439, and English cases there cited.)

Passing from this point it should be remembered that the suit of the Central National Bank of Boston was begun in the supreme court of New York and was removed into the United States circuit court on the gound of citizenship of parties.

All that can be claimed for the decree of the latter court is that it be accorded the same force and effect as a similar judgment of the supreme court of New York. (Dupasseur *v.* Rockereau, 21 Wall., 130, 135; Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S., 141, 147.) It cannot be doubted that if the Central National Bank of Boston had proceeded to judgment in the supreme court of New York that the judgment in the case at bar would have dealt with that judgment precisely as it did with the decree in the United States circuit court.

We will now consider the disposition of this case by the court below, on the merits.

An examination of the evidence satisfies us that the findings of fact are abundantly sustained.

The fifth and sixth findings of fact are to the effect that the suit of Sackett was neither brought nor conducted for the purpose of realizing the property to the owners of the Lebanon Springs bonds, but that it was brought and conducted for the purpose of realizing

out of the property certain individual claims of Sackett and Tilden in preference to and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property and were behind the mortgage. It appears that these claims exceeded thirty thousand dollars, and the aggregate fees of counsel and receiver were about sixty-one thousand dollars, all of which were paid out of the proceeds realized by the sale of receiver's certificates.

852 The failure to bring in the necessary parties in order to render binding any judgment that might be obtained in the Sackett suit, is sufficient of itself to stamp the entire proceeding as colorable and fraudulent. There was in fact no real contest, and the rights of bondholders were ignored.

The absence from the record of the Union Trust Company of New York of Park, Duncan, Hull, Lincoln and the trustees under the other mortgages than those represented by the Union Trust Company renders the Sackett suit a legal absurdity. (Western R. R. Co. *v.* Nolan, 48 N. Y., 513; Hallett *v.* Hallett, 2 Paige, 15–22.)

We do not deem it necessary to discuss in detail the legal points raised attacking the jurisdiction of the court and the form of the action.

We think this suit is maintainable under established principles of equity jurisprudence.

The rule is well settled that courts will set aside as a nullity a judgment, decree or award obtained by fraud. (Hackley *v.* Draper, 60 N. Y., 88; State of Michigan *v.* Phœnix Bank, 33 *id.*, 8; Dobson *v.* Pearce, 12 *id.*, 156; Wright *v.* Miller, 8 *id.*, 9; Whittlesey *v.* Delaney, 73 *id.*, 571; Tiernan *v.* Wilson, 6 Johns. Ch., 411; Campbell *v.* Railroad Co., 1 Woods, 368.)

[On margin in pencil:] The decree in the U. S. circuit court was not obtained by fraud. There is no finding nor a particle of evidence to that effect.

This action was promptly begun within two years after the sale in the Sackett suit, and is to be regarded as a bill for relief against the Sackett judgment and all proceedings in that suit as fraudulent. It is not necessary to consider it as strictly a bill of review nor to discuss the law bearing upon suits of that nature.

The action was properly and seasonably brought.

There is the further question whether the certificate-holders have any just ground to complain of the judgment as entered.

By its provisions a referee was appointed to ascertain who were the owners of the Lebanon Springs bonds and which of the bonds were actually in the Sackett suit. It further provided that the referee to sell should pay the net amount realized to the Lebanon Springs bondholders, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit, he should pay so much thereof to the holders of the receiver's certificates, and the balance, if any, to the holders of such bonds.

The bondholders of the Lebanon Springs Railroad Co. duly represented in the Sackett suit were, of course, bound by the order and

judgment authorizing the issue of certificates; the remaining bondholders were in no way affected by the judgment.

It is, therefore, apparent that the certificate-holders have been as fully protected by the judgment in the case at bar as was possible. There are no exceptions that should lead to reversal.

The judgment appealed from should be affirmed, with costs.

All concur except Gray, J., not voting.

Judgment affirmed.

A copy.

H. E. SICKELS,
Reporter C.

A copy.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

853 [Endorsed:] Stevens *v.* Central Nat. B'k Boston. Opinion. Bartlett, J.

854 Court of Appeals of the State of New York.

AARON R. STEVENS and Others, Respondents,
against
THE CENTRAL NATIONAL BANK OF BOSTON and Others, Appellants, Impleaded with Others.

SIR: You will take notice that this court will be moved, at a term thereof to be held on the 28th day of January instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard, upon the return and remittitur in the above-entitled action and the briefs of parties submitted upon the argument thereof, and upon the opinion of the court herein, and upon the notice of motion to dismiss the appeal herein and the papers accompanying the same, and upon the affidavit of Alpheus T. Bulkeley and the other papers filed on behalf of the appellants in opposition to said motion for a reargument of the appeal in the above-entitled action, upon the ground that it appears from the said papers herein referred to that this court have overlooked and misapprehended certain facts and points herein, and particularly that the court has overlooked the fact that in the complaint herein no relief was asked as against the decree rendered by the circuit court of the United States on the 24th day of March, 1887, of which decree a copy is annexed to the answer of the appellants herein, and have also overlooked
855 and misapprehended the fact that the matters by reason of which the judgment in the so-called Sackett suit was held to be fraudulent and void existed and were of record before the rendition of the said decree of the United States circuit court and before the commencement of the action in which the said decree was rendered, and has also overlooked the fact that there was no evidence whatever upon the trial of this action or any allegation in the

pleadings herein that the said decree of the United States circuit court was obtained by fraud or by any misrepresentation on the part of the appellants herein or the complainant in the said suit in which the United States circuit court decree was rendered, and have also overlooked the fact that the validity of the receiver's certificates held by the appellants was open to inquiry and adjudication in the United States circuit court in the action or suit above referred to, and have also overlooked the fact that the sale which this court in the opinion aforesaid states was without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment appealed from, in fact took place under the express direction of the circuit court of the United States, which held that the injunction contained in the judgment in this action was without force or effect so far as it attempted to enjoin such sale, and that other matters of fact and of law were overlooked and misapprehended by this court, and that the appellants will then and
856 there move for such further or other order in the premises as may seem to the court just and equitable.

Dated January 10, 1895.

Yours, &c., HALE, BULKELEY & TENNANT,
Attorneys for Appellants, 25 North Pearl Street, Albany, N. Y.

To Edward Winslow Paige, Esq., surviving partner of the firm of Campbell & Paige, attorneys for plaintiffs, respondents, and counsel for respondents.

857 [Endorsed:] Court of appeals. Aaron R. Stevens and others, resp'd'ts, against The Central National Bank of Boston and others, app'l'ts, impleaded, &c. Copy notice of motion for reargument. Hale, Bulkeley & Tennant, attorneys for appellants, 25 North Pearl street, Albany, N. Y. To —— ——, Esq. Copy within mailed to attorney for resp'd'ts Jan. 10, '95. E. C. S. Original filed on mo. for rearg't Jan. 28, 1895. A. C. T.

858 And afterwards the following order was entered:

STATE OF NEW YORK:

In Court of Appeals.

At a court of appeals for the State of New York, held at the capitol, in the city of Albany, on the fifth day of February, A. D. 1895.

Present: Hon. Charles Andrews, chief judge, presiding.

AARON R. STEVENS and Others, Respondents,
against
THE CENTRAL NATIONAL BANK OF BOSTON and Others, Impl'd, etc., Appellants.
} Order on Motion for Reargument.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellants herein, and papers having been duly submitted thereon and due deliberation thereupon had—

Ordered, that the said motion be, and the same hereby is, denied, with ten dollars costs.

A copy.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS, *Clerk.*

859 [Endorsed:] State of New York. In court of appeals. Order on motion for reargument.

860 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison, plaintiffs, and The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, impleaded with The Union Trust Company of New York; James C. Hull, William Butler Duncan, John G. McCullough, as administrator of the goods, chattels, and credits of Trenor W. Park, deceased; The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as receiver of the property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing,
John A. Nichols, Henry A. Tweed, as surviving trustees
861 of the creditors and stockholders of the New York Loan and
Indemnity Company; Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndike, William P. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting, and Eustace C. Fitz, and William D. Shipman, as assignee of William Butler Duncan, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the de-

cision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the
862 Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States in and for the Northern District of New York.

Allowed by—
CHAS. ANDREWS,
Ch. Judge Ct. of Appeals of State of New York.

863 Know all men by these presents that we, Benjamin Marsh, jeweler, of the city of Albany, N. Y., and Benjamin W. Johnson, banker, of the city of Albany, N. Y., are held and firmly bound unto Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison in the full and just sum of five hundred dollars, to be paid to the said obligees, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a term of the court of appeals of the State of New York, in a suit depending in said court between the said Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William

Henry Douglas, deceased, and Ida S. Harrison, plaintiffs, and the said The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert, impleaded with others, judgment was rendered against the said The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert, and the said last-named defendants having obtained a writ of
864 error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit and a citation directed to the said Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

BENJAMIN MARSH. [L. S.]
BENJAMIN W. JOHNSON. [L. S.]

Sealed and delivered in *in* presence of—
A. T. BULKELEY.

Approved by—
CHAS. ANDREWS,
Chief Judge Ct. of Appeals, N. Y.

865 STATE OF NEW YORK, }
City & County of Albany, } *ss:*

On this 6th day of March, 1895, before me, the subscriber, personally appeared the above-named Benjamin Marsh and Benjamin W. Johnson, of the city and county of Albany and State of New York, both of whom are to me known and known to me to be the individuals described in and who executed the foregoing undertaking, and then and there each of them severally acknowledged that he had executed the same.

ALPHEUS T. BULKELEY,
Notary Public, Albany Co., N. Y.

CITY AND COUNTY OF ALBANY, *ss:*

Benjamin Marsh and Benjamin W. Johnson, being severally sworn, each for himself says: The said Benjamin Marsh that he is a resident and freeholder of the county of Albany, within this State, and that he is worth the sum of $1,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Benjamin W. Johnson for himself says that he is a resident and householder of the county of Albany, within this State, and that he is worth the sum of $1,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

866 BENJAMIN MARSH.
BENJAMIN W. JOHNSON.

Severally sworn to and subscribed before me this 6th day of March, 1895.

ALPHEUS T. BULKELEY,
Notary Public, Albany Co., N. Y.

Filed in office of clerk of the court of appeals of the State of New York, March 9th, 1895.

867 [Endorsed:] Supreme Court of the United States. The Central National Bank of Boston and others, plaintiffs in error, against Aaron R. Stevens and others, defendants in error. Copy. Undertaking on writ of error. Matthew Hale, attorneys for plaintiffs in error, 25 North Pearl street, Albany, N. Y.

868 Supreme Court of the United States.

THE CENTRAL NATIONAL BANK OF BOSTON and Others, Plaintiffs in Error,
against
AARON R. STEVENS and Others, Defendants in Error.

Of October term, in the year of our Lord one thousand eight hundred and ninety-four.

Afterwards, to wit, on the first Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert, by Matthew Hale, their attorney, and say that in the record and proceedings aforesaid it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have

been given for the said plaintiffs in error and against the said defendants in error; and also in this, to wit, that said plaintiffs in error claimed that they were entitled in the court of appeals of the
869 State of New York to a reversal of so much of the judgment of the supreme court of the State of New York as adjudged that the plaintiffs in error (defendants in said action), The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert, and all other owners of certificates issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants, and attorneys, are perpetually enjoined and restrained from proceeding with the sale under the decree rendered by the circuit court of the United States in and for the northern district of the State of New York in the action brought by the said The Central National Bank of Boston against the defendants in said decree, Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York, a copy of which decree is attached to the answer of the Central National Bank of Boston in this action, and from suffering said sale to proceed in their or any of their names or behalf, and also to a reversal of so much of said judgment as perpetually enjoined and restrained all the owners of any of the certificates above described, as issued by the receiver, Van Valkenburgh, and each of them, and their and each of their officers, agents, servants, and attorneys,
870 from bringing and from proceeding with any action or proceeding in any court whatever to enforce any lien upon or for the sale of or to affect any of the premises, property, franchises, and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them; and also to a reversal of so much of the said judgment of the supreme court of the State of New York as required the referee named therein to ascertain, determine, and report from the evidence and findings and such other evidence as might be furnished him who are the holders of the certificates issued by the said receiver, Van Valkenburgh, and how much has been paid upon the same, and authorized and directed the said referee to give notice, by advertising, requiring the holders of said certificates to produce the same before the said referee at his office in Saratoga Springs, or at such other place and at such other time as he might designate, and make proof as to their title thereto and the amount due thereon, on the grounds—

1. That the court below erred in that it did not give due validity and effect to the said decree of the circuit court of the United States in and for the northern district of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated,

was complainant, and Rowland N. Hazard, William Foster,
871 Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said court also erred in perpetually enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the circuit court of the United States above referred to.

3. That the said court also erred in enjoining and restraining all owners of any of the certificates described in said judgment as issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants, and attorneys, from bringing and from proceeding with any action or proceeding in any court whatever to enforce any lien upon or for the sale of or to affect any of the premises, property, franchises, and powers in said judgment described or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them.

4. The said court also erred in requiring the referee named
872 in the said judgment to ascertain and report, from the evidence taken upon the trial in said action and the findings of the court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said court also erred in providing in the said judgment that the said referee therein named ascertain, determine, and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates issued by the said receiver, Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained, and determined by the said circuit court of the United States in and under the decree of the said circuit court of the United States above referred to.

6. The court below also erred in that by its judgment it required the holders of the said certificates, including the plaintiffs in error, to produce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon, whereas the said facts as to the title to said certificates and as to the amount due thereon had been conclusively ascertained in and pursuant to the said decree of the circuit court of the United States above referred to.

873 7. The court below also erred in refusing to find, as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Valkenburgh, as receiver, and held

by the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; The Massachusetts Mutual Life Insurance Company, and the other persons who have appeared before the master *pro hac vice* and produced their certificates, are as against all the parties to the action and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint, as adjudged by the circuit court of the United States by its decree in the suit of The Central National Bank of Boston *vs.* Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the master *pro hac vice* named in said decree, and as reported by said master.

8. The court also erred in refusing to find, as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action such sale should be subject to the rights of the defendant The Central National Bank of Boston and the other defendants, holders of receiver's certificates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate-holders first out of the proceeds of any sale that might be had therein.

874 And that the said court of appeals should have reversed so much of the judgment of the supreme court of the State of New York as in any way impairs the rights of the plaintiffs in error or any or either of them under the said decree of the said circuit court of the United States or in any way enjoins, restrains, or prevents the plaintiffs in error or any or either of them from enforcing the said decree of the said circuit court of the United States, or from having and enjoying the full benefit thereof, but that the said court of appeals in fact decided the contrary to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the supreme court of the State of New York.

And the said Central National Bank of Boston and the other plaintiffs in error above named pray that the judgment of the court of appeals aforesaid and the judgment of the supreme court of the State of New York aforesaid, so far as it enjoins and restrains the enforcement of the said decree of the circuit court of the United States or in any way impairs the rights of the plaintiffs in error or any or either of them thereunder, or in any way interferes with the due execution and enforcement of the said decree of the circuit court of the United States or impairs the effect thereof, may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment of the court of appeals and the said judgment of the supreme court of the State of New York, affirmed as aforesaid by the said court of appeals of the State of New York.

Dated March 7th, 1895.

MATTHEW HALE,
Attorney for Plaintiffs in Error.

875 [Endorsed:] Supreme Court of the United States. The Central National Bank of Boston and others, plaintiffs in error, against Aaron R. Stevens and others, defendants in error. Original. Assignment of errors. Matthew Hale, attorney for pl'ffs in error, 25 North Pearl street, Albany, N. Y.

876 UNITED STATES OF AMERICA, *ss:*

To Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, and Sarah Gilbert, impleaded with others, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

CHAS. ANDREWS,
Chief Judge Ct. of Appeals, New York.

877 [Endorsed:] Supreme Court of the United States. The Central National Bank of Boston & others, plaintiffs in error, against Aaron R. Stevens and others, defendants in error. Citation. Matthew Hale, attorneys for plaintiffs in error, 25 North Pearl street, Albany, N. Y.

Due & personal service of a copy of the within citation, signed by Charles Andrews, chief judge of the court of appeals of the State of New York, is admitted this 7th day of March, 1895.

CAMPBELL & PAIGE,
Attorneys for Plaintiffs.

Endorsed on cover: Case No. 15,841. New York court of appeals. Term No., 248. The Central National Bank of Boston *et al.*, plaintiffs in error, *vs.* Aaron R. Stevens *et al.* Filed March 22d, 1895.

IN THE

Supreme Court of the United States.

No. 568 of October Term, 1895.

The Central National Bank of Boston and others,
Plaintiffs in Error,
against
Aaron R. Stevens and others,
Defendants in Error.

Brief of Plaintiffs in Error in Opposition to Motion to Dismiss or Affirm Under Rule 6. Sub. 5.

Statement of the Case on the Part of the Plaintiffs in Error.

The notice of motion is based "upon the annexed printed portions of the record, and the other papers annexed." The grounds of the motion, as stated in the notice, are "that the case does not contain any Federal question," and further "because it is manifest that the writ of error was taken for delay

only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument." (See motion papers, p. i.)

The motion is made on behalf of the defendants in error, The Lebanon Springs Railroad, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas as Trustee, and Ida S. Harrison." (Id. p. ii.)

But there is no such defendant in error as the Lebanon Springs Railroad. The other persons in whose behalf the motion purports to be noticed, were the plaintiffs below, and are defendants in error here. It appears from certain of the moving papers that a motion was made in the Court of Appeals in which "Edward Winslow Paige, attorney for L. S. R. R. for this motion," joined with Campbell & Paige, attorneys for plaintiffs, in a motion there to dismiss and affirm; that a resolution was passed by the board of directors of the Lebanon Springs Railroad in April, 1894, in which it was recited that that company owned all the interest of the appellants by virtue of a deed of Worthington Frothingham, referee appointed by the Circuit Court of the United States, to William Foster, Jr., and the deed of William Foster, Jr., and wife to this company, that the judgment in this action be affirmed; that the pending appeals be withdrawn; that the president execute, in the name of the company, a stipulation and consent to the

plaintiffs, to the affirmance of the judgments and the withdrawals of the appeals, and to that end, that the president employ and direct counsel for and in the name of the company to consent to and assist in any motion which may be made by the plaintiffs for the dismissal of the appeal, and the affirmance of the judgment. (See motion papers, p. 83.) When and by whom the Lebanon Springs Railroad was organized, or what it is, does not appear. It is supposed to be a New York corporation formed for the purpose of receivng the deeds of the premises in question.

The motion to dismiss and affirm does not appear to have been acted upon by the Court of Appeals. The judgment brought here by the writ of error is simply a judgment of affirmance by the Court of Appeals of the judgment given by theNe York Supreme Court. (See p. 104.) Among the papers presented to the Court of Appeals on the motion to dismiss and affirm, is a deed dated April 25th, 1892, fromWorthington Frothingham, referee named by the decree of the United States Circuit Court, to William Foster, Jr., conveying the railroad premises in question (pp. 92-96), and a deed from William Foster, Jr., and wife to the Lebanon Springs Railroad of the same and other premises. (Pp. 84-91.)

Among the motion papers printed by the counsel for the moving parties, is an affidavit of Alpheus T. Bulkeley, one of the attorneys for the plaintiffs in

error in the court below, in which certain facts are stated which will be referred to more in detail hereafter. It may be stated in the outset, however, that the extracts from the record and the papers furnished to the court on this motion by the defendants in error, present a very inadequate and imperfect view of the case, and the facts therein, and that the questions attempted to be raised cannot be, from the moving papers without reference to the entire record fully or thoroughly understood by the court. If, therefore, the assignment of errors presents questions of which the court has jurisdiction, the motion will be denied. (*Crane Iron Co.* v. *Hoagland*, 108 U. S. 5.)

Enough appears, however, upon the motion papers to show that the case does present a Federal question; that the plaintiffs are interested in that question, and that the question presented to the court, far from being frivolous on the part of the plaintiffs in error, is so clearly sound, that the epithet "frivolous" might more properly be applied to the motion than to the writ of error.

CHRONOLOGICAL STATEMENT.

We give here a chronological statement of the facts so far as the same are necessary for consideration and so far as they may be gathered from the motion papers:

FIRST. *The Sackett suit, so called.*

Mr. Paige gives us nothing with reference to that suit, except what appears in the recitals in the judgment in this action brought here by the writ of error.

It is not conceded that the recitals in this judgment as to the Sackett suit, are correct. On the other hand, a reference to the entire record if it had been brought before the court, would show that these recitals in the judgment which was prepared by the counsel for the defendants in error, was an extremely incomplete, unfair and one-sided statement of the alleged facts. The following facts, however, do appear:

1. The Sackett suit was brought by one Marvin Sackett, claiming to be the owner of bonds issued by the Lebanon Springs Railroad Company, to the amount of $8,700, on the 7th day of September, 1880. (P. 31, fol. 121.) His complaint alleged that he brought the action on behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who held any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit; that he prayed for a sale of the whole of the railroad company and franchises. (P. 31, fol. 123.)

On the 1st day of October, 1880, John W. Van Valkenburgh was appointed receiver. In November, 1880, one Bloodgood and other parties claiming to own a majority of the Lebanon Springs bonds, and who did own more than $300,000 of the same, applied to be made parties to the action, which motion was opposed by the plaintiff and denied 27th November, 1880. The order denying the motion, however, directed the plaintiff to serve copies of all papers and notices of every kind on the petitioners' counsel, one F. L. Westbrook, who was by the order authorized and allowed to appear as counsel on behalf of the said Bloodgood and the other six bondholders upon all trials, hearings and motions. This order was made January 10, 1881.

November 6th, 1880, Park and Duncan applied as bondholders to be made parties. Their application was opposed by the plaintiff, was heard on the 27th November and 10th December, 1880, and was not granted. (P. 33, fol. 131.)

One Henry A. Tilden who claimed to own thirty Lebanon Springs bonds, was associated with Sackett in the bringing of this suit, and retained the Hon. Hamilton Harris as counsel therein, and assumed to control the action. (Fol. 132.)

February 23, 1881, the receiver verified a petition, to the court, for instructions. (P. 33, fol. 132.) On the presentation of this petition, March 5, 1881, an order was made appointing one Jones,

an expert, to examine the railroad. Jones made his report March 19, 1881. The report of Jones was presented to the court by the receiver, and after hearing counsel for the receiver, no one else appearing, he was ordered to issue certificates of indebtedness to the amount of $350,000, to bear interest at six per cent. and to be a first lien upon the property. This order also appointed a referee to hear and determine all existing claims against the Lebanon Springs Railroad. This order was filed April 4, 1881.

The Sackett suit was brought at the request and with the concurrence of holders of Lebanon Springs Railroad bonds amounting to about $1,200,000 (p. 37, fol.145), and other persons owning about $500,000 of such bonds were also associated with the plaintiff Sackett and represented in that suit by Sackett's attorney and counsel. (Fols. 147 to 149.) The entire issue of these bonds was $2,000,000. (P. 10, fol. 37.)

Various other proceedings in the Sackett suit occuring during the years 1880 and 1881, and being matters of record in the Supreme Court of the State New York of those dates, are recited in the judgment (pp. 34, 35, fols. 134-138), by which the court ordered various payments aggregating about the sum of $35,000 to be made to the plaintiff, plaintiff's attorneys, to counsel for the receiver and to various persons presenting claims against the Leb-

anon Springs Railroad Company. The largest o these items was a claim of Henry A. Tilden for $25,267.37, presented June 29, 1881. (Motion papèrs, pp. 34, 35.)

These claims were all allowed by the referee on the 5th of July, 1881. No objection to these claims or to their payment seems to have been made by any of tne parties to the action or any person interested in the railroad. The record shows, although the moving papers do not, that the decisions of the referee upon these various claims were all confirmed by the court, and that the amounts so allowed were paid by the receiver out of the funds which were the avails of the receiver's certificates.

It is the payment of these claims that constitutes the supposed fraud on account of which the judgment herein vacates and sets aside the judgment in the Sackett suit. There is no pretence that the plaintiffs in error or any certiffcate holder knew of any of these payments or derived any benefit therefrom.

The action was noticed for trial on the 23rd day of September, 1884. The trial was had pursuant to such notice, October 10, 1884, at which appeared counsel for the plaintiff, counsel for the Central National Bank of Boston, and other certificate holders, and the Hon. Hamilton Harris, who had been retained by Henry A. Tilden, for the plaintiff, and had also received from F. L. Westbrook authority

to represent him. (P. 35, fols. 139, 140.) The judgment in the Sackett suit, although contained in the record, is not among the papers presented to the court on this motion, but is a part of the appeal record. It appears, however, that it directed a sale of all the railroad and property contained in the State of New York, subject to the principal of the receiver's certificates, and directing the purchase money to be applied in payment, first, of certain counsel fees and expenses of the receivership, and next the interest due on the receiver's certificates, the certificates not being due, and directing any balance to be paid into court. (Pp. 35 and 36, fols. 140, 141.)

The judgment in the Sackett suit was entered the 27th of January, 1885. The premises were sold to William Foster, Jr., as trustee, for $155,000 cash (p. 36, fol. 141), on the 12th day of June, 1885, acting on behalf of himself and Rowland N. Hazard. (p. xi, fols. 31, 32), the purchaser, assuming the payment of the certificates.

SECOND. *The certificate holders' suit.*

In April, 1886, plaintiff in error, The Central National Bank of Boston, suing for itself as well as for all others similarly situated, brought an action in the New York Supreme Court in Rensselaer county against Rowland N. Hazard, William Foster, Jr., The New York Rutland & Montreal Railway

Company and The American Loan & Trust Company of New York defendants. The complaint in this suit may be found pages v to xv of the moving papers. It set up the issuing of receiver's certificates in the Sackett suit under the order of April 2, 1881 (p. v); that the receiver duly issued and negotiated certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from the said certicates to the uses and purposes in the said order mentioned and authorized (pp. viii and ix, par. III of complaint); that the plaintiff was at the time of bringing the action, and had for several years last past, been the holder and owner of said certificates amounting in the aggregate to $250,000 of principal thereof (p. ix, par. IV); that the receiver's certificates not held by the plaintiff, were held by divers persons and corporations, many of whose names are unknown to plaintiff (p. ix, par. V); that in the Sackett suit the plaintiff appeared on the trial of the issues therein, made proof in regard to the issuing of the receiver's certificates, and its title thereto, and that such proceedings were had in said action; that judgment was rendered January 12, 1885, whereby it was among other things adjudged and decreed that the said certificates of indebtedness issued by said receiver, amounting in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the said railroad

and its property as provided in the said above-mentioned order, and as stated in said certificates for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in the said judgment provided, whereby it was further adjudged and decreed that the property, franchises and rights of the Lebanon Springs Railroad Company, and all the right, title and interest of any and of all the parties thereto, be sold at public auction by George McClellan, Esq., referee, for the benefit of the first mortgage bondholders of the railroad company, and that said sale be made subject to the payment of the undue principal and interest of the receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and that said purchaser or purchasers should assume, as part of the consideration of said purchase, the payment thereof, and that from the avails of said sale, after the payment of cerain other expenses therein provided for, the said referee should pay the amount of interest due on said receiver's certificates. (Pp. ix and x, par. VI.) The complaint further alleges a sale under and in pursuance of the judgment in the Sackett suit, and that the defendants William Foster, Jr., and Rowland N. Hazard became the purchasers thereof for the price or sum of $155,000,

that being the highest sum bid therefor, and that the said defendant William Foster, Jr., acting on behalf of himself and the defendant Hazard, then and there paid five per cent. of the purchase money, and did by his attorney subcribe a certain contract of sale, which was also subscribed by the referee, whereby, among other things, he for himself and said Hazard assumed and agreed to pay the amount of unpaid principal and interest on the said receiver's certificates, as part of the consideration of the purchase; that the balance of said sum of $155,000 was thereafter paid by the said purchasers to the said referee, and the said referee did thereafter duly execute and deliver to the defendants Foster and Hazard, a deed of said premises and property in the judgment described, and the referee, from the said sum of $155,000 paid the interest due on the receiver's certificates amounting to about $60,000 (p. xi, par. VII); that this referee's deed was accepted by the defendants Foster and Hazard, and duly recorded in the county of Rensselaer, and that in and by the deed, the grantees took the property subject to the said unpaid principal and interest on the receiver's certificates as required by said judgment. (Pp. xi, xii, par. VIII.)

That the principal of the certificates with interest from the 1st day of January, 1886, became due and payable on the 2nd day of April, 1886, and on that day the said certificates held by plaintiff,

amounting to $250,000, were duly presented to the Farmers' Loan & Trust Company of the city of New York, where they were payable, and payment thereof demanded, but the same was refused, and that the whole of the said principal with interest from the 1st day of January, 1886, was then due and unpaid. (P. xii, par. IX.)

The complaint then proceeds to give a description of the premises as described in the judgment, and in the said referee's deed (pp. xii to xiv, par. X); alleges that the defendants or one or some of them are now in possession of the premises and property described, and are using and operating the same for railroad purposes, and that all the defendants have, or claim to have, some interest in or lien upon the said premises or some part thereof, which interest or lien has accrued subsequently to the lien of the certificates. (P. xiv, par. XI.)

That there is now justly due plaintiff upon the certificates held by it the sum of $250,000, with interest from the 1st day of January, 1886. (P. xiv, par. XII.)

The relief prayed for in the complaint is substantially as follows: That the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon the premises described in the hands of the purchasers, and of any persons claiming through or under the purchasers on said referee's sale; that the defendants and all persons

claiming under them or either of them subsequent to the commencement of this acttion, may be barred and foreclosed of all right, claim or lien and equity of redemption in the said premises; that a receiver be appointed; that the premises or so much thereof as may be sufficient to raise the amount due to the plaintiff and to the other holders of said certificates for principal and interest, may be decreed to be sold according to law; that out of the moneys arising from the sale, the plainiff and other holders of certificates who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates with interest to the time of payment, and the costs and expenses of the action so far as the amount of such moneys properly applicable hereto, will pay the same, and that the defendants Rowland N. Hazard and William Foster, Jr., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto, and for other and further relief. (Pp. xiv, xv.)

Answers were interposed by the various defendants. Defendants Hazard and Foster appeared by their attorneys, Vanderpoel, Green & Cuming. Their answer may be found pages xiv to xix. Their answer denied various allegations of the complaint, and alleged that they were willing to pay the amount justly due on account of the receiver' certificates to the persons lawfully entitled to receive

payment thereof; that when the property came into their hands, it was subject to a lien for the amount actually due to the receiver and his successor, but for no other or greater amount (p. xviii, fol. 54); that in accepting the deed, the defendants intended only to obligate themselves to pay the amount actually due the receiver on said certificates with proper interest, and no other or greater sum by way of profit, and they ask that either the complaint be dismissed with costs or that an accounting be had in the premises to determine what, if any, liens are on the property, and in whose favor, and that the defendants might be fully assured and protected for any payments for or on account of said receiver's certificates. (P. xi, fol. 56.)

The defendant The New York, Rutland & Montreal Railway Company answered by its attorney, Robert Ludlow Fowler. Its answer may be found, pages xx to xxvi of the moving papers. It alleged that defendants Hazard and Foster did not acquire the property described in the complaint subject to a lien for a sum greater than that justly due to the *bona fide* first takers of the said certificates and alleged that that amount had never been ascertained by any judicial inquiry, and that it had never been ascertained who were the *bona fide* first takers for value of said receiver's certificates. (Pp. xx to xxii, par. V.) It denies most of the material allegations of the complaint and sets up the proceed-

ings in the Sackett suit; alleges that the receiver issued 500 of the certificates in question, of the par value of $500 each, in violation of the order of April 2, 1881, to one Edward Crane, as his agent, without consideration; that Crane pledged or hypohecated such 500 certificates with the Pacific National Bank of Boston, to secure a loan made to said Crane. Subsequently, said Crane is said to have paid over to said receiver a portion of the sums so realized by him, but said property described in the complaint became liable by reason thereof only for the sums actually so received by its receiver in the aggregate, a sum greatly less than the face of said certificates (pp. xxii and xxiii, fols. 66 to 68); that the certificates so issued to Crane may be those claimed to have passed to the plaintiff at or about the time when the Pacific National Bank became grossly insolvent, and it alleges that if they have so passed to the plaintiff bank, it is as collateral for some debt or claim due to the plaintiff by said insolvent Pacific National Bank or by said Crane or by some other intermediary, and not for value then or ever paid by the plaintiff bank, and that the plaintiff can in any event have no rights in respect thereto superior to those of the Pacific Naional Bank. (Pp. xxiii, fols. 68, 69.) It admits that the certificates issued by the receiver were a charge on all the property in the hands of the receiver for the amount actually paid for said certificates or advanced thereon by the first

holder with interest, but for no more than such sums with interest. It also alleges the subsequent discharge of Van Valkenburgh, as receiver, and that one William V. Reynolds succeeded him, who acquired the property subject to the lien of the receiver's certificates; that the property was brought to a judicial sale in the Sackett suit, and purchased by the defendants Hazard and Foster, and that afterwards the said Hazard and Foster conveyed all the property and franchises precisely as conveyed to them by McClellan, the referee, to the answering defendant (The New York, Rutland & Montreal Railroad Company) subject to the payment of the sum justly due by said receivers, but subject to no greater sum than that due by said receivers to the first holder or holders of said certificates. (P. xxiv, fols. 71, 72.) It also avers that the defendant is ready and willing to pay the sums justly due by the said receivers to the persons lawfully entitled thereto, but that the plaintiff is not entitled to receive payment, whoever else may be. (Pp. xxiv to xxv, fols. 72, 73.) It is also averred, among other things, that in accepting the deed from Hazard and Foster, it intended only to pay the amount actually due from the receiver on the said certificates with proper interesst and no other or greater sum by way of profit (p. xxv, fol. 74), and that it acquired said property subject to no greater lien in favor of any holder of receiver' certificatess than existed against the property

in the hands of the receiver, and that that amount the defendant stood ready and offered to pay to the persons so justly and legally entitled.

This answer asked as relief that the complaint be either dismissed with costs or else that an accounting be had in the premises to determine what amounts are a lien on the property, and in whose favor, so that the defendant may be fully assured and protected, &c.

The defendant The American Loan & Trust Company (of New York) answered by Blair & Rudd, its attorneys, alleging that it was a mortgagee of the premises under a mortgage executed by the defendant The New York, Rutland & Montreal Railway Company (p. xxvii, fol. 81), the issuing of bonds secured by said mortgage to the amount of $1,400,000 or thereabouts (p. xxviii, fol. 83), and alleging substantially that it appeared to protect the rights of the bondholders for whom it was trustee, praying that the amounts due to the plaintiff and other holders of receiver's certificates might be ascertained, and that the defendant might have an opportunity to pay the sums so ascertained and established, and for other or further relief. (P. xxix, fol. 86.)

The defendants afterwards on the 17th of September, 1886, all joined in a petition for the removal of the suit into the Circuit Court of the United States for the Northern District of New York. (See extracts from removal papers, pp. xxxi to xxxvi.)

Testimony on behalf of the complainant and defendants was taken in Albany and in Boston, and the case came on for hearing before Judge Wallace, and was argued by counsel for complainant and also by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants. A decree was then made, to be found in the moving papers. (Pp. xxxvi to xli.) Inasmuch as a disregard by the State courts of this decree and an attempt to interfere with and practically to reverse it under the form of an injunction restraining the complainants therein from enforcing it, is the principal ground of error alleged herein: the said decree, omitting the description, is herewith again presented.

DECREE OF UNITED STATES CIRCUIT COURT IN FAVOR OF PLAINTIFFS IN ERROR, CERTIFICATE HOLDERS.

"At a Special Term of the Circuit Court of the United States in Equity sitting, held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the City of Syracuse, on the 24th day of March, 1887.

Present: Hon. William J. Wallace, Circuit Judge.

THE CENTRAL NATIONAL BANK of Boston, which sues as well for itself as for all others similarly situated.	
vs.	
Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.	

This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew Hale, of counsel for complainant, and by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2nd day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described

in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and Willaim Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant The Central National Bank of Boston is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000, of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon, from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid theron. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said district, requiring the holders of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as

to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certicates to contribute to the expenses of this suit.

That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certicates, and expenses of sale and costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said district, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amout of its costs and disbursement to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid;

together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other of said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and

William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and hereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein:

(Description.)

Leave is hereby reserved to the complainant and

to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases.

WM. J. WALLACE."

THIRD. *Proof of certificates in the United States Circuit Court.*

The report of William Lansing, master *pro hac vice*, appointed by the decree of the United States Circuit Court, may be found at pages xlii to l of the printed motion papers, from which it appears that the various certificate holders made their proofs before the master, which were reported by him to the court. If the entire record were printed, it would show that this report was duly confirmed by the U. S. Circuit Court.

FOURTH. *The sale under the United States Circuit Court decree.*

The State court having granted the injunction, contained in the judgment now before this court enjoining the complainants from causing or suffering

a sale to take place under the United States Circuit Court decree, application was made by Mr. Peter Butler, then receiver of the Pacific National Bank, since deceased, for an order requiring the referee appointed by the United States Circuit Court decree to proceed with the sale notwithstanding the injunction contained in the judgment of the New York Supreme Court. The papers on this motion, which was of course, made after the rendition of the judgment which is brought before this court by writ of error for review, are not presented in the motion papers, but such papers do contain the opinion of Judge Wallace in granting the motion, which may be found at pages 74 to 80.

FIFTH. *Contempt proceedings.*

Application was promptly made by the counsel for the plaintiffs in this action, to punish Mr. Butler and the other certificate holders for contempt in violating this injunction. Those proceedings are, of course, no part of the record in this case. The moving counsel, however, produces exemplified copies of two certain orders which he causes to be called final orders (p. 123, fol. 415), dated, the first order April 2nd, 1893, and the other September 19th 1895, which were filed in the office of the clerk of the New York Supreme Court for Albany county on the 23rd day of September, 1895 (p. 127, fol. 428), by one of which it is ordered that

the application to punish the certificate holders other than Mr. Butler, be denied and the proceedings dismissed (p. 125, fol. 422), and by the other of which "it appearing to the court that the said Peter Butler has died, it is ordered that the said application be and is hereby denied, and the proceedings dismissed." (P. 127, fol. 427.)

It will be noticed that these orders were filed long after the writ of error, dated March 7th, 1895, and the return thereto, had been filed with the clerk of this court.

The certificate is that they were filed September 23, 1895. Counsel for plaintiffs in error never learned of them until copies of the papers on this motion were served upon them.

Counsel does not produce the petition or application on which the motion to punish for contempt was made, or anything from which the court can judge whether these orders are or are not to be considered as adjudications binding upon the plaintiffs in error.

SIXTH. *The Stevens suit.* (This action).

The judgment which is brought before this court for review by writ of error, was rendered in an action commonly known as the Stevens suit. The counsel brings before this court, on his motion, nothing but the judgment rendered by the Supreme Court in this suit November 10, 1891. Neither the com-

plaint nor the answers of any of the defendants are brought before the court on this motion. It is recited in the judgment, however, that the notice of the pendency of action in the suit was filed on the 10th day of October, 1887, and that other notices of pendency of action were subsequently filed on the 24th of September, 1888. The judgment is dated November 10, 1891 (pp. 1 and 2, next after the pages marked with letters).

Under the practice then prevailing in the State of New York, various requests for findings of fact and decisions upon questions of law were filed with the court, and marked with its approval or disapproval, which, if presented to the court, would show many material matters which do not appear from the papers printed in behalf of this motion. It appears from the printed papers (although not from the record) that a motion was made before the learned justice of the Supreme Court, who rendered the judgment, to strike therefrom the portion thereof enjoining the plaintiffs in error from enforcing their decree in the United States Circuit Court (see pp. 57 to 70, fols. 219 to 258), but such motion was not granted. (P. 70, fol. 258.)

Assignment of Errors.

The assignment of errors may be found on pages 117 to 122 of the motion papers. It recites that the plaintiffs in error claimed that they were entitled

in the Court of Appeals of the State of New York to a reversal of so much of the judgment of the Supreme Court of the State of New York as adjudged that the plaintiffs in error, the Central National Bank and others, naming them, and all owners of the said receiver's certificates, are perpetually enjoined and restrained from proceeding with the sale under the decree rendered by the Circuit Court of the United States above set forth (fols. 399 to 401), and also to a reversal of so much of said judgment as perpetually enjoined and restrained all the owners of any of the said receiver's certificates from proceeding with any action or proceeding in any court whatever to enforce any lien upon or for the sale of said premises (fols. 401, 402), and also to a reversal of so much of the judgment of the Supreme Court of the State of New York as required the referee named therein to ascertain, determine and report from the evidence and findings, and such other evidence as might be furnished him, who are the holders of the certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon the same, &c., and assigns as error in the judgment of the Court of Appeals, affirming the judgment of the New York Supreme Court.

1. That it did not give due validity and effect to the decree of the Circuit Court of the United States above set forth.

2. That it erred in perpetually enjoining and

restraining the plaintiffs in error from proceeding with the sale under the said decree.

3. That it erred in enjoining and restraining all owners of any of the said certificates described, from proceeding with any action or proceeding in any court whatever to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, and from suffering any such action or proceeding to be brought or prosecuted.

4. That the court erred in requiring the referee named in the judgment to ascertain and report upon the evidence taken upon the trial and the findings of the court, and such other evidence as might be furnished him, who other than the plaintiffs in the said action are the holders of the bonds issued by the Lebanon Springs Railroad Company and Harlem Extension Railroad Company.

5. That the court also erred in providing in said judgment that the said referee ascertain and determine and report from the evidence and findings and such evidence as might be furnished him, who are the holders of the said certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon them, such facts having been found, ascertained and determined by the said Circuit Court of the United States under said decree.

6. That it erred in requiring the holders of said certificates, including the plaintiff in error, to pro-

duce their certificaes before said referee and make proof as to their title thereto, and the amount due thereon; whereas, said facts as to the title to said certificates and as to the amount due thereon, had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States.

7. That the court below erred in refusing to find as requested by the plaintiffs in error, that the receiver's certificates held by the defendants in said action (plaintiffs in error here) are as against all the parties to the action, and all the holders of the bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the railroad and premises described in the complaint, as adjudged by the Circuit Court of the United States in its said decree.

8. That the court also erred in refusing to find as requested by the plaintiff in error that if any sale be made under the judgment in said action, it should be subject to the rights of the defendants The Central National Bank of Boston, and the other certificate holders, plaintiffs in error herein, and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein. (Pp. 119 to 122, fols. 404 to 412.)

Also that the Court of Appeals should have reversed so much of the judgment of the Supreme Court of the State of New York, as in any way im-

pairs the rights of the plaintiffs in error or any or either of them under the said decree of the Circuit Court of the United States, or in any way enjoins, restrains or prevents the plaintiffs in error or any or either of them from enforcing said decree or from having or enjoying the full benefit thereof. (P. 122, fol. 412.)

POINTS ON BEHALF OF PLAINTIFFS' IN ERROR.

FIRST. IT IS CLEAR THAT THE CASE PRESENTS FEDERAL QUESTIONS, OF WHICH THIS COURT HAS JURISDICTION.

1. The decision of the court below refuses to give due effect to a judgment or decree of a United States court.

(a.) This is a Federal question within the jurisdiction of the United States Supreme Court, on a writ of error, to the highest court of the State. (*Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141.)

As was said by Mr. Justice Bradley, in delivering the opinion of this court:

Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of

the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the constitution; and it is clearly within the chart of appellate power given to this court over cases arising in, and decided by, the State courts. (*Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Embry* v. *Palmer*, 107 U. S. 3; *Crescent Live Stock Co.* v. *Slaughter House Co.*, 120 U. S. 141.)

(b.) In this case the judgment of the court below, as rendered, directly and expressly attempts to nullify a decree of the United States Circuit Court.

(1.) The decree of the United States Circuit Court declares the receiver's certificates to be a lien upon the premises and property described in the complaint in the hands of the defendants in that suit or of any persons claiming under them. The judgment in this suit attempts to defeat the said lien and subordinate it to the rights of others.

(2.) The referee named in said decree of the Circuit Court is directed to give public notice of sale and to sell the premises described in the decree,

which are the same as the premises described in the complaint in this action. The judgment in this case perpetually enjoins the certificate holders from proceeding with the sale, and " from suffering said sale to proceed in their or any of their names or behalf."

(3.) The decree in the Circuit Court provides that, in case of any deficiency, the defendants, Hazard and Foster, shall pay to the complainant and the other certificate holders the residue of the indebtedness on said certificates remaining unsatisfied *after the sale* of said property. The judgment in this case deprives us of the benefit of that part of the decree by perpetually enjoining a sale, and thus defeating the personal decree against Foster and Hazard.

(4.) The United States Circuit Court decree, as against all the parties to that suit, takes possession of the property and premises described therein for the purposes of such decree. They were until the sale under said decree, as against those parties, and for the purpose of that suit, in the possession and under the control of the United States Circuit Court. This possession is good as against the world. It is a complete defense to any claim made in a State court to the property in question. (*Covell* v. *Heyman*, 111 U. S. 176, and cases cited; *Rio Grande*

Railroad Company v. *Gomila*, 132 U. S. 478; *Central National Bank* v. *Hazard*, 49 Fed. Rep. 293; Opinion of Wallace, J., motion papers, p. 74.)

(5.) The decree in the United States Circuit Court adjudges that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates amounting in the aggregate to $250,000 of principal thereof, and adjudges the amount due and unpaid thereon. (Motion papers, p. xxxvii, fol. 110.) It also provides for proof by the other certificate holders of their certificates and the amount due thereon before a master *pro hac vice* named in said decree. (Fol. 111.)

The judgment of the New York Supreme Court now brought before this court, requires the referee named therein to ascertain, determine and report from the aforesaid evidence and findings, and such evidence as shall be furnished him, who are the holders of the said certicates issued by the said receiver Van Valkenburgh, and how much has been paid upon said certificates, and directs him to give notice by advertising in two newspapers published in the State of New York, to the holders of certificates, to produce the same before him, and make proof as to their title thereto, and the amount due thereon. (Motion papers, p. 46, fols. 181-183.)

The referee named by the State court is thus authorized upon the evidence and findings in the

Sackett suit, "and such other evidence as shall be furnished him," to determine who are the holders of the receiver's certificates and how much is due thereon. No force or effect is given to the decree of the United States Circuit Court. The whole matter is opened and subjected to the determination of the referee appointed by the State court, as if there had never been any determination of the matter in the Federal Court. (See assignments of error 5, 6, pp. 120, 121, fols. 408, 409.)

(6.) The trial court was requested by the plaintiffs in error to find in accordance with the decree of the Circuit Court that the receiver's certificates held by the plaintiffs in error were as against all the parties to that action, and all holders of the bonds of the Lebanon Springs Railroad Company, including the plaintiffs below, a first lien on the railroad and premises, as adjudged by the Circuit Court, and also that if any sale should be made under the judgment in said action, such sale should be subject to the rights of the plaintiff in error, and should be first paid out of the proceeds of sale. These requests and the rulings thereon appear in the record, but are not presented to the court by the motion papers. They are the subject of the 7th and 8th assignments of error (p. 121), and under the rule laid down in *Crane Iron Co.* v. *Hoagland*, 108 U. S. 5, the errors assigned must be presumed to appear in the record.

(7.) It is not at all material that the suit of the Central National Bank of Boston was originally brought in the New York Supreme Court and removed into the United States Circuit Court by the defendants therein. It is conceded, and found by the court below, that the United States Circuit Court acquired jurisdiction. The case was carried to that court by the very defendants for whose benefit the injunction was inserted in the judgment and is now insisted on. After the removal, the defendants appeared in the United States Circuit Court and put in their defense, which was by that tribunal overruled. We only asked that the State court would give "due faith and credit" to the decree of the Federal tribunal, duly made in that suit, which it could not do without reversing the judgment appealed from, so far as it undertakes to enjoin the plaintiffs in error from enforcing the decree in their favor made by the United States Circuit Court.

SECOND. THE FEDERAL QUESTIONS PRESENTED BY THE PLAINTIFFS IN ERROR, FAR FROM BEING FRIVOLOUS, ARE SUSTAINED BY THE REPEATED DECISIONS OF THIS COURT COVERING A PERIOD OF MORE THAN EIGHTY YEARS.

The judgment in this case contains the following clause:

"That the defendants, the Central National Bank of Boston (and naming the other certificate holders), and all other owners of certicates issued by the said Van Valkenburgh, as receiver, as aforesaid, and each of them, and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, the Central National Bank of Boston, against the defendants, Hazard, Foster, the New York, Boston and Montreal Railway Company and the American Loan and Trust Company, a copy of which is attached to the answser of the Central National Bank of Boston in his action, and from suffering said sale to proceed in their or any of their names or behalf." (Fols. 659-663.)

1. The decree of the United States Circuit Court was made March 24, 1887, has not been appealed from, but stands unreversed and in full force.

By that decree, certain rights are given to the complainant therein and the other holders of receiver's certificates represented by the complainant. A sale of the premises described in the decree was adjudged, and in case of a deficiency, two of the defendants, Foster and Hazard, were made personally liable, and directed to pay any deficiency that might remain to the complainant and other certificate holders, so as to pay their certificaes in full. (See decree on p. 55 of case.) Of course it will appear by a bare inspection of the decree that the right

of the complainant to a personal judgment against Hazard and Foster depends upon a sale of the premises under that decree and a deficiency, after the application of the proceeds of sale to the payment of the certificates.

The judgment of the court in this action, if valid, absolutely deprives the complainant in that suit and the other certificate holders of their right, adjudged by the Circuit Court of the United States, to compel Hazard and Foster to pay this deficiency.

It virtually deprives the certificate holders of the benefit of that decree, and this, at the suit of outside parties, who claim not to have been affected in any respect by the decree in the United States Circuit Court.

This judgment attempts to, and, if valid, does, practically, so far as any benefit to the parties to the suit in the United States Circuit Court is concerned, annul and reverse the decree of that court.

No pretense is made that the Circuit Court of the United States had not jurisdiction of the case. The action was brought in the New York Supreme Court, but was removed to the United States Circuit Court by the defendants therein, and, as the court below has found was so duly removed. The defendants in that action all appeared and answered, and were heard in the United States Circuit Court. The referee named in that decree was at the time of the commencement of this action advertising the

property and franchises described in the decree for sale, pursuant to the rules and practice of the court, all of which have been found as facts by the trial court herein in the forty-sixth and forty-seventh findings of facts as will appear by reference to the record herein, though these findings are not contained in the motion papers.

2. The New York Supreme Court had no power to enjoin the enforcement of a decree of the United States Circuit Court, by judgment or otherwise.

Its judgment, so far as it attempted to enjoin the enforcement of the decree in the United States Circuit Court, is absolutely void and of no effect. The authorities under this head are abundant.

(a.) In *McKim* v. *Voorhis* (7 Cranch, 279), decided in 1812, Mc Kim, a citizen of Maryland, had recovered a judgment in ejectment against Voorhis, a citizen of Kentucky, in the Circuit Court of the United States. Voorhis filed a bill in the Kentucky State court, and obtained an injunction staying all further proceedings on the judgment. The Supreme Court of the United States held that the State court had no jurisdiction to enjoin a judgment of the Circuit Court of the United Sates.

(b.) *Riggs* v. *Johnson County* (6 Wall. 166). The plaintiff had obtained a judgment in the United

States Circuit Court for the district of Iowa, and issued execution, which was returned unsatisfied. After the return of the execution, an Iowa State court granted an injunction perpetually enjoining the county officers from levying a tax to pay the judgment. Notwithstanding this injunction, the plaintiff applid to the United States Circuit Court for a mandamus to the county comimssioners to compel them to levy a tax sufficient to pay the judgment. The commissioners answered making as a return the injunction previously laid on them by the State court. The plaintiff demurred to the answer, assigning four causes of demutrer, the substance of the one chiefly relied on being that after the judgment was rendered in the Circuit Court, the State court had no jurisdiction, power or authority to prevent him from using the process of this court by mandamus to collect his judgment. The Circuit Court overruled the demurrer, and a judgment was given for the commissioners; but this court on error, held that the demurrer should have been sustained, and that the State court had no jurisdiction to grant the injunction. The subject was very fully discussed by Mr. Justice Clifford, who wrote the opinion in the case. It is stated by him that "if the power is conferred to render the judgment or enter the decree, it also includes the power to issue the proper process to enforce such judgment or decree." (P. 187.)

It is expressly determined " that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied." (P 187.) "Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the constitution." (P. 187.)

Again, it is held in the same case:

Authority of the Circuit Courts to issue process of any kind which is necessary to exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts, or by any act of a State legislature. (P. 194.)

Again, it is said:

State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and State courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them " was traced by landmarks and monuments visible to the eye." Appellate relations exist in a class of cases between the State courts and this court, but there are no such relations between the State courts and the Circuit Courts.

Viewed in any light, therefore, it is obvious that

the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action, Circuit Courts are wholly independent of the State tribunals. (Pages 195, 196.)

This principle has ever since been maintained in this court. *United States* v. *Council of Keokuk*, 6 Wallace, 514; *Mayor* v. *Lord*, 9 Wall. 409; *Supervisors* v. *Durant*, id. 415; *Amy* v. *Supervisors*, 11 Wall. 136.

In the case of *Mayor* v. *Lord*, *supra*, it is said by Mr. Justice Swayne:

It is not competent for a State tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts, and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question. (P. 414.)

In *Amy* v. *Supervisors*, *supra*, Mr. Justice Swayne says:

The two sets of tribunls—State and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction for the satisfaction of its judgments and decrees. (11 Wall. 138.)

(d.) In *Rio Grande Railroad Company* v. *Gomila*, (132 U. S. 478), it is said that " the jurisdiction of

a court of the United States once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in a State court." (P. 481.)

(e.) This question has been decided in accordance with the contention of the plaintiffs in error by the Circuit Court of the United States for the Northern District of New York, with reference to the injunction granted by the judgment in this very action.

See *Central Nat. Bank* v. *Hazard*, 49 Fed. Rep. 293, in which Judge Wallace, in his opinion, uses the following language:

> No Federal court has ever recognized the authority of a State court to enjoin its proceedings or to enjoin parties from proceeding, in a suit in which the Federal court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the Federal courts. (Citing the cases above referred to.) (P. 295.)
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> * * * * * * * *

In the present case, after the decree was made by this court ordering the property to be sold by its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in

the Sackett suit, and the property had been conveyed to Hazard and Foster, the property passed from the dominion which the State court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett suit. As was said in *Barrow* v. *Hunton*, 99 U. S. 80:

"If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; * * * a new case arising upon new facts, although having relation to the validity of an actual judgment or decree."

The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody, continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently commenced in a State court. (*Railroad Co.* v. *Gomila*, 132 U. S. 478.) (P. 296.) (See motion papers, pp. 77 to 79, fols. 278 to 284.)

(f.) These decisions of this court that an interference by injunction by the State courts with proceedings in the courts of the United States, will not be tolerated, have recently been repeated and emphasized in the case of *Moran* v. *Sturges*, 154 U. S. 256, reversing the judgment of the New York Court of Appeals in the case, *Matter of the Schuyler Steam Tow Boat Co.*, 136 N. Y. 169. The reason-

ing of this court in that case is entirely inconsistent with the contention of the defendants in error, that the State court has power virtually to annul a decree of the Federal court by enjoining the parties in whose favor it is rendered from taking the proper steps to enforce the decree.

3. The court below had no right to inquire into the merits of the case, which was decided by the Circuit Court of the United States.

The following language of this court used in reference to a judgment of the United States Circuit Court, well states a plain and well-settled proposition in regard to the effect of judgments or decrees of courts of competent jurisdiction:

Their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit, and in every form where it is legitimately produced as the foundation of an action, or of a defense, either by plea or proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate. (*Crescent City Live Stock Co.* v. *But-*

chers' Slaughter House Co., 120 U. S. 141, 157, 158. See, also, *Covell* v. *Heyman*, 111 U. S. 176.)

This case should not be confounded with those in which something has arisen since the rendition of the judgment to render its enforcement inequitable, as where the judgment of the Federal court or of a sister State has been reversed upon appeal, or where it has since been paid or collected. (See High on Injunctions, sec. 269.)

The courts below seem to have thought that the rendition of the judgment in this case brings it within the doctrine above stated (see opinions of Judge Barlett, p. 113, fol. 385, and of Mr. Justice Putnam, pp. 69, 70, fols. 255, 256), but the "something" which must arise after the rendition of the judgment, in order to authorize a State court to prohibit its enforcement, must be a reversal or payment or something of that kind. The judgment in this case depends entirely upon facts which existed before the decree in the United States Circuit Court was rendered, and it does not, as the learned justice states, "avoid" the certificates.

See opinion of Mr. Justice Putnam denying motion to strike out the clause in the judgment enjoining appellants from enforcing the judgment by a sale of the premises. (Motion papers, pp. 69, 70, fols. 255, 256; also 69 Hun, 460.)

It certainly does not and could not pronounce void

the agreement by which Foster and Hazard agreed to pay the certificates, which was adjudged by the United States Circuit Court to make them binding upon all the parties to the suit in that court.

Nor should the case be confounded with cases like *Barry* v. *Brune* (71 N. Y. 262), where two parties claimed the same fund, and one brought a suit in the Federal court without making the other a party, in which case a bill of interpleader was brought in this State, in which both parties claimant were made defendants as well as the judgment debtor, the insurance company, and it was held that a judgment might be entered restraining the collection of so much of the judgment in the United States Circuit Court as was held to be payable to the other claimant. This case would be analogous to that if there was some party claiming to own the receiver's certificates other than the complainant and the other parties in the United States Circuit Court. But there is no question here that if anybody was entitled to recover upon the certificates, it was the parties who prevailed in the United States Circuit Court. Neither the complaint nor the proofs in this case show any *facts* arising since the decree of the United States Circuit Court impairing the obligation of the defendants in that suit to pay as therein adjudged.

4. The portions of the decision and judgment re-

ferred to were not at all necessary to give the plaintiffs below the relief to which the court decided that they are entitled.

The defendants in error have never contended, and no court has ever decided, that the receiver's certificates were void, or that they were not a lien upon the premises to the extent that the bondholders who participated in the Sackett suit were represented therein. There can be no doubt that Foster and Hazard, as purchasers under the judgment in the Sackett suit, obtained good title to such interest, as the parties to the Sackett suit had in the premises in question. The plaintiff's original contention was, that that was only to the extent of Marvin Sackett's bonds, amounting to $8,700. It is decided in this case, however, that that interest extended to the bonds owned by plaintiffs who participated and did not hold aloof from the Sackett action. Such was, we understand, the decision of the trial court. It necessarily follows, then, that Foster and Hazard became by their purchase, the equitable, if not the legal, owners of so much of the premises in question as belonged in equity to the bondholders represented in the Sackett suit. If the court below was correct in this, a sale under the decree of the United States Circuit Court could give title to the purchaser there-under only to the extent of such interest. The rights of the purchaser are perhaps subject to the rights of such of the bondholders as

were not repreented in the Sackett suit. (See *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Embry* v. *Palmer*, 107 U. S. 3.)

5. The portions of the decision and judgment above referred to must have been inserted in the interest of the defendants in the United States Circuit Court suit, and not in the interest of the defendants in error who make this motion.

The Lebanon Springs Railroad, for whom Mr. Paige professes to act in making this motion (see p. 11, fol. 4), is not a party to this action, and has no standing in court to make this motion. It has, however, no interest whatever in maintaining the portion of the judgment below, of which we complain. Its title derived from Foster's deed will certainly be no worse because the injunction which forbade the sale to Foster, is reversed and held for naught.

The other persons in whose name Mr. Paige also makes this motion, have no interest whatever in maintaining their rights real, or pretended, as bond holders, in sustaining this part of the judgment. Their rights are fully and entirely protected by other portions of the judgment. In fact, the only parties to the record who are interested in maintaining the validity of this injunctive part of the judgment, are Rowland N. Hazard and William Foster, Jr., who are named in the writ of error as defendants (p. iii, fol. 7), and who do not come to the front, or appear

openly in making this motion. That they, or rather William Foster, Jr., alone (for we understand that Mr. Hazard has since died insolvent), is the real party who is seeking to sustain this interference by the State court with the decree of the United States Circuit Court, is plain from the facts, which are below more fully referred to, appearing in the affidavit of Mr. Bulkeley. (Pp. 99 to 103 of the motion papers.)

If the entire record, including the answer of defendants Foster and Hazard, had been printed and brought before the court on this motion, it would have plainly appeared that they were not in a position to object to the enforcement of the decree of the United States Circuit Court.

THIRD. THE COURT BELOW APPARENTLY OVERLOOKED THE FACT THAT THIS COURT HAS REPEATEDLY HELD THAT AN INJUNCTION RESTRAINING PARTIES FROM AVAILING THEMSELVES OF A DECREE OR JUDGMENT IN THEIR FAVOR IN THE FEDERAL COURTS IS, IN SUBSTANCE AND EFFECT, AN ATTEMPT TO REVERSE OR NULLIFY SUCH JUDGMENT OR DECREE.

Most, if not all, of the cases cited on the argument in the Court of Appeals were cases where the State courts had attempted not directly to enjoin the United States court, but to enjoin the successful

parties in the United States court from availing themselves of their judgment or decree.

Thus in *Riggs* v. *Johnson County* (6 Wall. 166), the injunction granted by the Iowa State court was against the county officers, enjoining them from levying a tax to pay the judgment in the United States court, and this was held to be beyond the powers of the State court.

In *United States* v. *Council of Keokuk* (6 Wall. 514), the injunction by the State court was directed to the defendants, the Common Council of Keokuk, enjoining them from levying a tax to pay the judgment in the United States court. This injunction was held to be inoperative.

In the *Mayor* v. *Lord* (9 Wall. 409), the injunction of the State court was against the mayor and aldermen of the city of Davenport to restrain the said officers from levying a tax to pay certain bonds of the city upon which a creditor had recovered judgment against the city.

In *Supervisors* v. *Durant* (9 Wall. 415), the injunction of the State court was against the supervisors of a county to prevent their levying a tax to pay interest on bonds on which the relator had obtained judgment in the United States court.

So in *Amy* v. *Supervisors* (11 Wall. 136), the injunction of the State court was against the supervisors to restrain them from levying a tax to pay the judgment obtained in the Federal court.

Indeed, it is too plain to require argument, that an injunction granted by a State court, whether by order or judgment, which undertakes to restrain the successful parties in a suit in the Federal court, which has proceeded to judgment or decree, is in substance and effect a reversal and annulment of the judgment or decree itself. Nobody can enforce such judgment or decree, but the party to the suit or action, who has succeeded. If a State court can, by its order or judgment, prohibit him from enforcing the judgment or decree in his favor, it does virtually reverse and annul the judgment of the Unied States court.

It is to be observed, also, that the judgment appealed from not only enjoins the certificate holders from proceeding with the sale under the decree, but undertakes to restrain them " from *suffering said sale to proceed* in their or any of their names or behalf." (Fol. 662.)

The statement, therefore, of the learned counsel for the defendants in erorr, in his brief below, and repeated in his brief here on p. 38, that " there is nothing in the judgment which interferes with the decree or the process of the officers of the United States court," is incorrect. The defendant certificate holders are commanded *not to suffer* the sale to proceed. In other words, they are commanded to prevent the sale, which the United States Circuit Court has commanded the referee to make. By

this judgment, the Supreme Court of the State of New York commands the certificate holder defendants to *prevent* the referee named in the United States Circuit Court decree, who is an officer of that court, from obeying the mandate of the Federal Court, that he shall proceed to sell. How can it be said that this is not an interference with the decree or with any officer of the United States court?

FOURTH. THE COURT BELOW OVERLOOKED THE CIRCUMSTANCE THAT NO *fact* HAS OCCURRED SINCE THE RENDITION OF THE DECREE OF THE UNITED STATES CIRCUIT COURT WHICH MAKES IT INEQUITABLE OR IMPROPER TO ENFORCE THAT DECREE.

We are aware that the Court of Appeals says in its opinion that "the setting aside of the judgment in the Sackett suit, upon which the suit in the United States Circuit Court was founded, for fraud, was *a new fact* occuring since the decree in that court, which gave jurisdiction in this action to enjoin proceedings thereon." (144 N. Y., last sentence of page 49.)

But in saying this, the court overlooked or disregarded the fact that the alleged fraud for which the Sackett suit was set aside was proved by facts which existed and were matters of record long before the decree in the United States Circuit Court

was rendered. Not a fact or a circumstance tending to establish fraud can be found in the voluminous record in this case, which was not a matter of record and accessible to all the parties in the United States Circuit Court case, at the time of the trial of that case. They were matters which could have been pleaded and proved as a defense in that suit. If the certificates were void by reason of fraud, such fraud was apparent upon the record of the Sackett suit, and the defendants in the action brought by the certificate holders could have set up such fraud and proved it as a defense. Having omitted or neglected to do so, it was not for the plaintiffs below in this suit to shield them, by proving it for them, in another and independent action brought to trial long after the decree in the United States court.

The setting aside of the judgment in the Sackett suit by the judgment at bar, was not a *new fact* giving to the State court jurisdiction to vacate or perpetually enjoin the enforcement of the judgment of a Federal court. If so, the well-settled rule that such interference by a State court is inoperative and invalid, is prctically abrogated.

Suppose the suit in the Federal court to have been for the specific performance of a contract, or for any equitable or legal relief founded on a contract. The unsuccessful party in the Federal court, instead of appealing from the judgment of that court,

chooses to bring a new action in a State court, and get a judgment setting aside, or, in the language of the counsel for the respondent, "wiping out" the contract upon which the suit was brought in the Federal court. Is that a new fact? If so, there can never be anything conclusive in a judgment in a court of independent jurisdiction. All that is necessary is for the court of the other jurisdiction to render a judgment on somebody's behalf other than the parties in the court of original jurisdiction, setting aside or "wiping out" the contract, which was the foundation of the first suit, and the judgment or decree of the court which first obtained jurisdiction, may be reversed and annulled, on the pretense of a "new fact" consisting of a provision of the very judgment which is complained of.

Again, it is a mistake to say that the certificates which were the foundation of the suit in which the United States Circuit Court rendered its decree, were annulled and wiped out by the judgment at bar. On the other hand, it is expressly held in this very case, by the courts below, that the certificates were good as to the bondholders, who were actually represented in the Sackett suit, and were binding upon them. There is nothing in the judgment at bar (striking out the injunction of which we complain) which is inconsistent with the fact that Foster and Hazard acquired, by the sale in the Sackett suit, title to an undivided part of the prem-

ises in question, bearing the same proportion to the whole premises as the number of bondholders represented in the Sackett suit bore to the entire number of bondholders, and the receiver's certificates were valid to the same extent.

FIFTH. THE RULE THAT COURTS WILL SET ASIDE AS A NULLITY A JUDGMENT DECREE OR AWARD OBTAINED BY FRAUD (see opinion of Judge Bartlett, motion papers p. 115, fol. 392), HAS NO APPLICATION TO THIS CASE.

There is no allegation or pretense, nor a particle of evidence anywhere in the record, that the decree in the United States Circuit Court, the enforcement of which is enjoined by this judgment, was obtained by fraud. There is on pretense, nor a particle of evidence that the certificates held by the plaintiff in error were not obtained and purchased by them in good faith. On the other hand, the court below found as a fact, that the defendant, The Central National Bank of Boston, became the purchaser for value of receiver's certificates to the amount of $250,000, which the said bank now holds and owns. (36th finding.)

It also finds that since the rendering of the decree, the defendants, who are the plaintiffs in error here, have duly appeared before the master *pro hac vice*

mentioned in the decree of the United States Circuit Court, and produced their certificates, and made proof of their title thereto, and the amount due thereon. (47th finding.)

These findings of fact do not, it is true, appear in those detached portions of the record which the counsel making this motion has seen fit to bring before this court, to the exclusion of the remainder of the record. That they are in the record, however, cannot be questioned.

SIXTH. THE COURT BELOW ENTIRELY MISAPPREHENDED THE EFFECT OF THE DECISION AND DECREE OF THE UNITED STATES CIRCUIT COURT.

1. The opinion of that court is reported, 30 Federal Reporter, 484. The following extract contains the portion of the opinion, which states the ground of the decision:

The defendants do not contest the validity of the certificates, but they claim that the receiver negotiated them collusively with one Crane, so that there was derived from them, for the benefit of the trust fund, a sum considerably less than ought to have been realized; and they insist that, as these certificates are not negotiable paper, the holders can enforce them only for the amount paid for them by the person to whom they were originally transferred by the receiver. The defendants are not in a posi-

tion to litigate such a defense. Receiver's certificates are not commercial paper, and the holder takes them subject to all equities between the original parties, even though he acquires them for value, and without notice; and when they are negotiated at a discount, which the receiver is not authorized to allow, a *bona fide* holder will only be protected to the amount actually advanced by the first purchaser. (*Stanton* v. *Alabama R. Co.*, 2 Woods, 506; *Union Trust Co.* v. *Chicago, &c. R. Co.*, 7 Fed. Rep. 513; *Bank of Montreal* v. *Chicogo R. Co.*, 48 Iowa, 518; *Turner* v. *Peoria R. Co.*, 95 Ill. 134.) But the defendants have no interest in the trust fund represented by the certificates; and it is wholly immaterial to them whether the certificates were or were not negotiated upon fair terms and for the best interests of the fund. The purchasers at the sale under the decree, and every person claiming under such purchasers, are estopped from contesting the validitty of the certificates or questioning the amount for which the certificates were declared to be a lien upon the property purchased. The decree adjudicated the certificates to be a lien to the extent of the principal and interest unpaid upon the entire issue of $350,000. The defendants are privies to that judgment, and are concluded by it, equally with the original parties to the suit. Every person is a privy to a judgment whose succession to the rights of property thereby affected, occurred subsequently to the commencement of the suit. Every grantee is estopped by the judgment against his grantor, because he holds by a derivative title from such grantor. (Freem. Judgm. sec. 162; *Adams* v. *Barnes*, 17 Mass. 367; *Campbell* v. *Hall*,

16 N. Y. 575, 579.) In *Swann* v. *Wright's Ex'rs*, 110 U. S. 590, a decree in a mortgage foreclosure provided that the sale of the mortgaged property should be made subject to the payment of all receiver's certificates which had been established as valid by prior decrees in the suit or by that decree, and it was held that the purchaser at the sale could not contest the lien of certificates, the validiy of which had been established by an interlocutory decree, even upon the ground of concealment and fraud subsequently discovered, by which, as was alleged, the decree had been obtained. Irrespective of the estoppel by the decree, the defendants cannot be heard to assert that the certificates are not a lien for the whole principal and interest due upon them. They are estopped because the deed executed by the referee, which is the source of the title of the defendants, conveyed the property "subject to the payment of the undue principal and interest" on the certificates. (*Horton* v. *Davis*, 26 N. Y. 495; *Freeman* v. *Auld*, 44 N. Y. 50; *Parkinson* v. *Sherman*, 74 N. Y. 88; *Grissler* v. *Powers*, 81 N. Y. 57.) (Pp. 485, 486.)

2. The decision of the trial court in this action was based entirely upon the opinion of the General Term of the New York Supreme Court. (57 Hun, 499, 515.) Mr. Justice Putnam, in his opinion, considers himself as entirely controlled by the opinion in 57 Hun, and quotes largely from it (p. 53). He says, "Whatever my views might be, I must, of course, be guided by the decision of the appellate court." (Fol. 207a.) And again, "Nothing re-

mains for me but to direct judgment in pursuance of the holding of the General Term." (P. 56, fol. 216.)

3. Looking the General Term opinion, we find the following with reference to the decree of the Unied States Circuit Court:

The Central National Bank of Boston, a large holder of these certificates, as plaintiff for itself and all other certificate holders, brought an action against Hazard and Foster, the purchasers of the railroad, upon the sale in the Sackett suit and against the New York, Rutland and Montreal Railway Company, to which company Hazard and Foster conveyed the railroad, and against the American Loan and Trust Company, trustees of mortgage bonds issued by the said railway company. Judgment was obtained against said defendants, establishing the bank's ownership of its certificates and their lien upon tthe railroad, and providing for the sale of the railroad to pay the plaintiff, and such others as should come in and establish their ownership. *Such a judgment is good against the defendants in that action.* They derive title to railroad under the Sackett sale, which preferred the certificates. It is not binding upon the plaintiffs. Whether Hazard and Foster, or their grantees, are entitled to any equity for betterments against the plaintiffs is doubtful; they were bondholders themselves and they acquired, by their purchase, the title of such of the other bondholders as acquiesced in the Sackett suit; they took the risk of its extent, and could

expend as much money in betterments as they chose. They co-operated with other bondholders in making the purchase and in organizing the New York, Rutland and Montreal Railway Company, in order to make it their grantee. This company could only mortgage its own title.

As there must be a new trial, we leave this question to be adjusted as the equities may then appear. There will need to be an idenification of the bond holders who are entitled to come in and share with the plaintiffs in this action. *They are those who held aloof from the Sackett action.* (57 Hun, pp. 514, 515.)

In the line of the above expression of opinion of the General Term, the Court of Appeals says in its opinion:

It must be admitted that the United States Circuit Court had jurisdiction of the subject matter in the suit referred to, and that its decree was proper and binding upon the parties before it.

There is nothing in the judgment at bar that attacks the jurisdiction of the United States Circuit Court or questions the legality of the decree. (144 N. Y., pp. 58, 59; motion papers, pp. 111, 112, fols. 381, 382.)

But the "judgment at bar" prohibits the complainants in that decree from enforcing it by causing or suffering a sale. And the court, subsequently in its opinion, says as follows:

We think it is clear, both upon principle and au-

thority, that this power did exist, and that the sale under the decree of the United States Circuit Court *was without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar.* (Pp. 112, 113, fols. 384, 385.)

In other words, the court below seems to hold that although the judgment at bar does not question the legality of the decree of the United States Circuit Court, still its injunction against the execution of that decree was so potent that a sale under the decree, although expressly directed by the United States Circuit Court, having before it "the judgment at bar," was "without force or effect as to the parties in that suit."

This curious judgment which does not "question the legality" of the decree of the Federal court, but enjoins its enforcement, and deprives the complainants therein of all benefit to be derived from it, reminds one of the crafty politician who announced himself as in favor of the prohibitory law, but opposed to its enforcement! It says to the plaintiffs in error "your judgment is valid and right, but is without force or effect so far as it confers any rights or benefits upon you."

SEVENTH. THE COURT BELOW EVIDENTLY MISAPPREHENDED THE GROUND UPON WHICH IT WAS CLAIMED BY THE PLAINTIFF IN ERROR AND WAS HELD

BY JUDGE WALLACE, UPON THE APPLICATION OF ONE OF THE CERTIFICATE HOLDERS FOR AN ORDER COMPELLING THE REFEREE TO PROCEED WITH THE SALE, THAT THE PORTION OF THE JUDGMENT AT BAR WHICH ENJOINS THE CERTIFICATE HOLDERS FROM CAUSING OR SUFFERING A SALE TO TAKE PLACE UNDER THE UNITED STATES CIRCUIT COURT DECREE, WAS UNNECESSARY.

Mr. Paige, in his brief, puts this upon the ground that the counsel for the certificate holders has always claimed that a sale under the United States Circuit Court decree would give perfect title to the premises. It is not important, however, what the counsel for the certificate holders has claimed. The question is, what the "judgment at bar" has held and adjudged.

The court below found as a fact that the Sackett suit was commenced at the request and with the concurrence of holders of Lebanon Springs Railroad Company bonds, amounting to about $1,200,000; that one Edward Crane, who was the owner of said bonds amounting to about $700,000 face value, was also represented in the Sackett suit; that certain other persons representing large amounts of the Lebanon Springs bonds were represented in the Sackett suit. Indeed, these findings appearing in the judgment, on pages 37 and 38 of the motion papers, would show that nearly or quite all the holders of the Lebanon Springs bonds, amounting

to $2,000,000, were represented in the Sackett suit.

It is very likely that some of the $1,200,000 of bonds mentioned in folio 145 are duplicated in the following statement; but the finding would certainly show that much the larger proportion of these bonds were represented in the Sackett suit.

It has always been conceded, and, as has already been seen, was found by the General Term, that the bondholders, who were actually represented in the Sackett suit, were bound by that decree and were, therefore, of course, bound by the subsequent decree in the United States Circuit Court made in the suit brought by the certificate holders.

EIGHTH. NOTHING HAS OCCURRED SINCE THE JUDGMENT WHICH AFFECTS THE RIGHT OF THE PLAINTIFFS IN ERROR TO A REVERSAL OF THAT PART OF THE JUDGMENT COMPLAINED OF.

1. The counsel for the defendants in error (plaintiffs below) noticed a motion in the Court of Appeals to dismiss the appeal and affirm the judgment (motion papers, p. 82), which, by stipulation, was heard at the same time with the appeal. (Id. p. 81.) This motion was based upon certain resolutions purporting to have been passed by the board of directors of the Lebanon Springs Railroad (pp. 82, 83), and a pretended stipulation of said railroad

(pp. 83, 84), a deed from William Foster, Jr., and wife to the Lebanon Springs Railroad, dated June 9, 1893 (pp. 84 to 91), and a deed from Worthingon Frothingham, referee, appointed by the decree of the United States Circuit Court, to William Foster, Jr., dated April 25, 1892 (pp. 92-96), and the confirmation of the report of sale by the United States Circuit Court. (P. 98.) In opposition to this motion, an affidavit was filed made by Alpheus T. Bulkeley, one of the attorneys for the plaintiffs in error (defendants below). (Pp. 99 to 103.) This motion was not passed upon by the Court of Appeals. The statement in the brief of the learned counsel for the defendants in error at page 24, that "the plaintiffs below moved in that court for the affirmance of the judgment (fol. 292), and it was there affirmed," while literally true, is (of course unintentionally) misleading. One would naturally infer from the statement that counsel meant to say that the judgment was affirmed upon that motion. But on examining the judgment of the Court of Appeals (p. 104), it will be seen that the affirmance by the Court of Appeals was upon the appeal from the judgment, and that no reference whatever is made either in it or in the opinion of Judge Bartlett, to the motion.

2. In addition to the papers used upon the motion in the Court of Appeals, the counsel produces

here exemplified copies of what purport to be two orders made in this action more than six months after the record in the action had been brought to this court by writ of error. These orders, both of which were filed on the 23rd day of September, 1895, bear date, one April 22, 1893, and the other September 19th, 1895. (Pp. 124, 126.) The first recites that an application has been made to the court (New York Supreme Court) to punish the defendants in that action named in the order (being plaintiffs in error here) for contempt for their disobedience of that part of the judgment which perpetually enjoined and enjoins them from proceeding with the sale under the decree of the United States Circuit Court, and from suffering the said sale to proceed in the name or behalf of either of them, and recites that it appearing to the court, and the court having found that none of the above-named defendants has in any way disobeyed said injunction nor anything in said judgment, and ordered that the said application be and is denied, and these proceedings dismissed. The other order recites an application to punish the defendant Peter Butler for contempt in disobeying the same injunction, his death, and orders that the application be dismissed. (Pp. 126, 127.)

3. The counsel for the defendants in error states his position with reference to these alleged facts upon his brief, as follows:

They cannot raise the question, because they sold notwithstanding the injunction, got all the benefit of their decree, and have also parted with all their interest in the property, which is now owned by the Lebanon Springs Railroad, defendant in error here in court asking the affirmance of the judgment.

That they cannot raise the question by virtue of being in peril of contempt, because it has been judicially and finally determined that they are not in contempt. (P. 7.)

In answer to these propositions, we say:

I. The deeds referred to in the notice of motion below afford no basis for the dismissal of the writ of error or for affirmance of the judgment.

Of course, the consent and stipulation by the Lebanon Springs Railroad to the dismissal of the appeal amount to nothing, unless that company is now possessed of *all* the rights and interests of the certificate holders. It is possessed of only such rights as were conveyed to Foster by Frothingham, referee. By the decree of the United States Circuit Court he was authorized to sell and convey only the premises described in the complaint, which were the right, title and interest of the Lebanon Springs Railroad Company in and to the real estate and property therein mentioned, being the premises and property described in the bill of complaint. The certificate holders had, under that decree, other rights which the judgment in this case undertakes to deprive them of. This is apparent by examining

the judgment in this case and especially the portions already quoted.

It also provides that the sale shall be made subject to a debt which the receiver has been authorized to contract, to the amount of $20,000, and to no other lien or charge whatsoever (pp. 44, 45, fols. 176, 177), thus entirely ignoring the lien adjudged by the United States Circuit Court decree, in favor of the certificate holders.

It appears, from the affidavit of Mr. Bulkeley in this case, that the defendant, William Foster, Jr., after the rendition of the judgment in this action, brought another action in the Supreme Court of the State against the Central National Bank of Boston and the other defendants, certificate holders, in which the prayer of the complaint was, among other things, that so much of the decree of the Circuit Court of the United States as adjudges or decrees that said William Foster, Jr., either alone or with Rowland N. Hazard, should pay to the said Central National Bank of Boston and to the other of said certificate holders, or either or any of them, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property, should be annulled and the enforcement thereof perpetually enjoined, and that as to so much of the decree of the United States Circuit Court as adjudges that the said Central National Bank of Boston and other certificate holders have execution for the residue

or any part of said indebtedness, the plaintiff is entitled to have the same annulled and the enforcement thereof perpetually enjoined, and praying for a perpetual injunction against the defendants in said action issuing execution under the said decree of the United States Circuit Court, or taking proceedings in the said court or otherwise, for the purpose of enforcing payment or collection of the said certificates or any of them: that, in his complaint in said action, Foster sets forth, among other things, the judgment in this action, and makes the same a part of his complaint; and the complaint of Foster in that action bases his claim for the relief asked, upon the judgment in this action; that the same justice of the Supreme Court who granted the judgment in this action granted an injunction in that action enjoining and restraining the said Central National Bank and other certificate holders from issuing execution upon the decree of the Circuit Court for the purpose of enforcing the payment or collection of any of the said certificates of indebtedness. It appears, also, from said affidavit that the defendants in that action removed the same into the Circuit Court of the United States for the Northern District of New York, and that the same is therein pending, and that the injunction therein granted by Mr. Justice Putnam has been vacated and dissolved. It appears further that in that case the Central National Bank

sets up in its answer and contends that the Supreme Court of the State of New York did not have and has not jurisdiction or power to deprive the defendant and the other certificate holders of the benefit of the decree rendered in the United States Circuit Court, or any of the remedies given to them thereby, and that it is claimed and contended by the counsel for said Foster i said action that the sale of the premises describ n the complaint therein, under the decree of the l ted States Circuit Court, is void, for the reason that the same was made in disobedience of the injunction contained in the judgment in this action, and that one of the grounds on which said Foster, in that action, is seeking to enjoin the certificate holders from issuing execution against him is, that the sale under the United States Circuit Court decree being void for the reason above stated, the Central National Bank and the other certificate holders had, therefore, no right to issue execution against said Foster, said right being dependent upon a legal and valid sale having taken place of the premises described in the bill of complaint, under said decree of the United States Circuit Court. (Motion papers, p. 102, fols. 352, 353.)

There are other circumstances mentioned in the affidavit of Mr. Bulkeley, from which the plaintiffs in error claim that this suit is brought in collusion with the said Foster and for his benefit, and that

this motion and the so-called resolution of the board of directors of the Lebanon Springs Railroad and the stipulation and consent executed pursuant therto by the alleged president of said railroad, were adopted in the interest of said Foster and by collusion with the plaintiffs or the counsel for plaintiffs in this action. (Same, p. 103.)

It is enough, however, to defeat this motion that the judgment at bar, if sustained as a legal and valid judgment, would invalidate the sale made under the United States Circuit Court decree, and would, therefore, deprive the certificate holders of the right to issue execution against Foster and Hazard, which right is dependent upon a *valid* sale under the said decree, upon the principle that an act done in violation of a valid and binding injunction conained in the decree of a court having jurisdiction of the parties and the subject matter, is void.

If the plaintiffs in error do not succeed in reversing that portion of the judgment in this action which enjoins them from selling the premises in question, or from enforcing the lien of their certificates, they may be absolutely deprived of their personal remedy against Foster and Hazard given them by the decree of the United States Circuit Court.

II. There are other interests of the plaintiffs in error which are affected by the judgment here, as

to which they have a right to be heard upon writ of error.

(a.) The referee is directed to pay to the certificate holders from the proceeds of sale herein, so much " as shall satisfy the same, as the same shall be found by the report of the referee." (Fol. 667.) The referee is, by the judgment, authorized also to determine " from the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of receiver's certificates and how much has been paid upon them " (fol. 675), and the holders are required to produce their certificates before the referee (fol. 676), and to " make proof as to their title thereto and the amount due thereon." (Fol. 677.)

These portions of the judgment are excepted to. The judgment provides in effect that the referee shall review the finding of the United States Circuit Court, which has established the rights of the certificate holders and passed upon their title, and that their right to share in the proceeds of any sale that may be made under the judgment in this action shall depend upon the finding by the referee as to the title to the certificates and the amount due thereon.

In other words, the right of the certificate holders to enforce the decree of the United States Circuit Court by a sale of the premises and execution

against Foster and Hazard, the defendants, in the United States Circuit Court action, is taken away by this judgment, if it be sustained. The title of the certificate holders to their certificates, which has been adjudicated in their favor by the United States Circuit Court, is also made by the judgment to depend upon the finding of the referee, who is to decide as to such title, not only from the evidence and findings of the court in this action, but from such other evidence as shall be furnished him.

It is clear that the plaintiffs in error have a substantial right which is not affected by the sale under the decree in the United States Circuit Court, or the deed given to Foster by the referee named therein, to have their writ of error from the judgment in this action heard and determined by this court.

III. The copies of orders made by the New York Supreme Court in this case, after the record had been brought to this court by writ of error, do not show that the plaintiffs in error are not still in danger of punishment for contempt if the injunction contained in this judgment be sustained.

The proceedings in which these orders were made, are not brought before this court. They could not well be, as they are no part of the record. It does not appear who applied to punish them for con-

tempt, though it may be inferred from the appearances recited, that it was the plaintiffs below.

But there are two kinds of contempt recognized in the New York practice. One is a criminal contempt, which may consist of a wilful disobedience of a lawful mandate of the court. (N. Y. Code of civil Procedure, sec. 8.) Another is a contempt by which a party is injured, which is punished on the application of a party injured for the purpose of indemnifying the party so injured. (N. Y. Code of Civil Procedre, sec. 14.) There is nothing to show under which of these sections the application was made. If it was made by a party claiming to have been damaged, for compensation or indemnity, the order would be no bar to a proceeding for criminal contempt. If it was a proceeding to punish for a criminal contempt, it would be no bar to an application made by a party for compensation for damage resulting from such contempt.

Inasmuch as the plaintiffs in error, while they did not affirmatively cause the sale to proceed under the United States Circuit Court decree, still did *suffer* it to proceed, and did nothing to *prevent* a sale by the referee under that decree, it is difficult to see how they could escape liability if the injunction were valid, for a violation of the command that they should not *suffer* a sale to take place.

The defendants in error have not shown therefore that the plaintiffs in error are free and dis-

charged from liability for punishment for contempt in the State court.

IV. But fear of punishmnt for contempt is not the motive which has induced the plaintiffs in error to bring this judgment before this court. They are parties to this action, and appeared therein. The courts of the State of New York acquired jurisdiction of their persons. If the judgment enjoining and prohibiting the sale stands as a valid judgment, affirmed by the Court of Appeals and by this court, or if the writ of error should be dismissed, it would be claimed by the defendant in error Foster, in his suit now pending, that there had been no valid sale, and that no execution could therefore be issued against him to enforce his personal liability for a deficiency. Indeed, he makes such claim now, and upon his claim, Mr. Justice Putnam of the New York Supreme Court granted a preliminary injunction enjoining the plaintiff in error from issuing execution to collect the deficiency against him.

We are aware that the learned counsel for the defendants in error, protests in his brief here that "the sale was not void, it was good." (Brief, p. 26); also p. 27, "The sale in question was not even in violation of the injunction." But the Court of Appeals held otherwise.

Let us try the "deadly parallel:"

MR. PAIGE'S BRIEF.	COURT OF APPEALS OPINION.
But the sale was not void. *It was good.* (P. 26, last line but one.) * * * But the sale in question *was not even in violation of the injunction.* (P. 27, beginning of second paragraph.)	We think it is clear, both upon principle and authority, * * * that the sale under the decree of the United States Circuit Court was *without force or effect* as to the parties in that suit, *as they proceeded in violation of the injunction contained in the judgment at bar.* (Pp. 112, 113, fols. 384, 385.)

Defendant in error Foster may therefore successfully contend if this court shall allow the injunction against the enforcement of the United States Circuit Court decree against him to stand, that it has been finally adjudged by the Court of Appeals, in an action to which the certificate holders and he were both parties, that the sale under the decree was wthout force or effect as to him and them, and that therefore, there having been no valid sale, the certificate holders should be enjoined from issuing execution against him for the deficiency in the suit which he has brought and which is now pending.

FINALLY. The counsel for the defendants in

error has caused to be printed and presented to the Court on this motion, but a small fraction of the record, hardly one-fifth thereof. Many very important matters bearing upon the question of the jurisdiction of the court and the interest of the plaintiffs in error are omitted — among others, all the pleadings in this action, and all the findings of the trial court made under the New York practice pursuant to requests or proposed findings made by the defendants below. He has also printed and presents to the court many papers, not contained in the record, which are not properly here, and ought not to be considered by this court, and which, as been has pointed out above, are incomplete and imperfect.

But enough facts appear, even from this hotchpotch of papers, to show that the motion should be denied; that there are Federal questions involved, upon which the judgment of this court should be taken, and that the plaintiffs in error have a vital interest in maintaining their position in regard to those Federal questions.

The plaintiffs in error have no reason for delay and do not desire it. They are anxious to meet the questions involved in this writ of error upon the merits. They hereby offer to join with the defendants in error in an application to the court to advance the cause, and that it be heard as soon as

the record, which is very voluminous, can be printed.

It is evident upon the principles laid down in 108 U. S. 5, that this motion cannot be granted without the court having the entire record before it. It should be denied with costs.

All of which is respectfully submitted.

Dated January 6, 1896.

MATTHEW HALE,
HENRY D. HYDE,
Attorneys and of Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

NUMBER 568.

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS, IDA S. HARRISON, THE LEBANON SPRINGS RAILROAD, and others,
Defendants in Error.

ON MOTION TO ADVANCE.

The undersigned, counsel for the plaintiffs in error in the above entitled case, make no objection to the advancing of said case, if it shall seem to the Court that there are good grounds for doing so, but would beg to suggest if the Court decides to advance the same that some day next autumn be assigned for it to be heard, as the record is very voluminous, and it will be very difficult for the clerk to print the same and deliver it to counsel in time to prepare suitable briefs therefrom, prior to the Spring adjournment.

MATTHEW HALE,
HENRY D. HYDE,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 248.

THE CENTRAL NATIONAL BANK OF BOSTON and others (holders of Certificates issued by John W. Van Valkenburgh, as Receiver of the Lebanon Springs Railroad Company), Plaintiffs in Error,

against

AARON R. STEVENS and others, Defendants in Error.

Brief of Plaintiffs in Error.

This case comes before this court on writ of error to the Court of Appeals of the State of New York, which rendered a judgment affirming a judgment rendered by the Supreme Court of the State of New York in favor of Aaron R. Stevens and others, plaintiffs below, defendants in error here.

The action was originally brought in the Supreme Court of the State of New York in the name of Aaron R. Stevens as sole plaintiff. Other parties were brought in as co-plaintiffs with him, as appears by the fifth amended complaint to be found on

pages 3 to 23 of the printed record. The plaintiffs below in whose favor judgment was rendered were the defendants in error, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison. These plaintiffs were or claimed to be holders of bonds issued by the Lebanon Springs Railroad Company, and some of them also holders of bonds issued by the Harlem Extenson Railroad Company, which was a successor of the Lebanon Springs Railroad Company. The prayer of the complaint may be found on page 23 of the printed record. It is in substance (1) that it may be adjudged that the owners of all the bonds issued by the Lebanon Springs Railroad Company have a first lien on the railroad and its property, and the owners of the bonds issued by the Harlem Extension Railroad Company, a second lien thereon, and that the bonds and mortgage executed by the defendants Hull and Lincoln to the defendant Duncan and Trenor W. Park is held for the benefit of the owners of the said bonds, and represents their interest solely, and that defendants Brown and Seligman redeliver the same; (2) that the judgment in the foreclosure suits, referred to more particularly hereafter, be specifically enforced, and the mortgage made by Hull and Lincoln be foreclosed and the railroad and property be sold under

said judgments and decrees, and the mortgage of Hull and Lincoln for the benefit of the plaintiff and all other of the owners of the Lebanon Springs and Harlem Extension bonds, and that all the defendants be barred and foreclosed, etc.; (3) that it may be adjudged that the certificates issued by Receiver Van Valkenburgh were beyond the power of the court to issue, and are of no validity except to bind the interest represented by the eight bonds of Marvin Sackett and the interests of the defendants in the action brought by said Sackett; (4) that all the defendants in this action and all other persons be enjoined from interfering with any part of the railroad or property; (5) for the appointment of a receiver; (6) for general relief.

The plaintiffs in error, The Central National Bank of Boston, interposed an answer to be found on pages 24 to 30 of the printed record. It was subsequently stipulated that this answer should be considered as the answer of the other certificate holders who were defendants in the action, as if they had united therein, and that it be deemed amended so far as to set up the claims of the said other certificate holders to the certificates owned by them, and in all other respects that are necessary in order to make the said answer applicable to the case of the said other certificate holders. (See page 86.) It was also stipulated and admitted that at the time the answer of the Central National Bank

of Boston was interposed, the 26th paragraph of the complaint did not contain the allegation as to the intention of Marvin Sackett in bringing his suit, which appears at the top of page 22 of the printed record, and that the admission in the answer of the certificate holders in the 12th subdivision of the first paragraph of the answer, near the end of page 25, should be considered as admitting only that portion of the 26th paragraph of the complaint, ending with the words "allowances of the suit" at the bottom of page 21, and that the remaining part of paragraph 26 should be deemed as controverted under the second paragraph of the answer. (See stipulation on page 85.) This answer sets up the decree of the Circuit Court of the United States hereinafter referred to (see fourth paragraph, p. 29 of record), and annexes a copy of the same thereto as a part thereof. (See schedule C, pp. 34 to 37.)

The judgment of the New York Supreme Court, which was affirmed by the Court of Appeals and which is brought by writ of error before this court, may be found on pages 87 to 119 of the printed record. This judgment recites the findings of fact and conclusions of law found by the court, and among other things, provides that the defendants, The Central National Bank of Boston and other certificate holders named therein, and all other owners of certificates issued by Van Valkenburgh, receiver, and each of them, and their and each of

their officers, agents, servants and attorneys are perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, The Central National Bank of Boston, against the defendants, Hazard, Foster and others, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sale to proceed in their or any of their names or behalf. (Printed record, p. 113, original, 188, 189.) It also provides that all owners of any of the certificates issued by Van Valkenburgh, receiver, are perpetually enjoined and restrained from bringing or proceeding with any action or proceeding in any court whatever, to enforce any lien upon or for the sale of or to affect any of the property franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them. (Printed record, p. 113, original, 188.)

The proceedings in the suit in which this decree was passed, including the making of the decree and the proof of title to the certificates by the certificate holders, were found by the court below in pursuance of the 46th and 47th requests of the plaintiffs in error, on page 503 of the record.

At the close of the evidence on the part of the plaintiffs below, counsel for the certificate holders

moved to dismiss the complaint, first for the reason that the plaintiffs had failed to show such relation to the subject matter, and to the bonds which they claimed to own, as enitled them to the interposition of the court in their behalf; second, that the plaintiff had proved that there was a foreclosure and sale under the decree in the suit brought by the trustee under this Lebanon Springs Railroad mortgage, a conveyance of the property to the purchaser, and the execution of liens by the purchaser, and transfer to a new party; assuming that to be so, then there was no such thing as a bondholder of the Lebanon Springs Railroad under the Union Trust Company mortgage in existence, and there is no such mortgage in existence; that there was a judgment and sale under the order of the court to the purchaser, so there was no mortgage to be enforced.

The motion was also made on the ground that it appeared by the evidence already in that in a decree in a suit in which the bondholders of the Lebanon Springs Railroad Company were represented by Marvin Sackett, the validity of the certificates had been established, and the certificates had been adjudged to be a lien upon this property to the extent of the entire amount unpaid at the time of the decree, and there being no evidence that the bonds presented here as belonging to the plaintiff Stevens were not represented in that suit, the presumption is that they were actually in fact repre-

sented by Marvin Sackett in that suit, and that the legal presumption is that they were so represented. (See printed record, pp. 432, 433.)

A similar motion was made on behalf of the defendants Foster and Hazard. These motions were denied and exceptions taken.

The additional ground was taken by the counsel for the certificate holders that plaintiff had made no proof showing that he had any equity or that he had any standing in court to maintain a suit in the nature of a bill in equity, and therefore his complaint should be dismissed. (Record, p. 433.)

The defendants also each moved to dismiss the complaint upon the additional ground that the complaint charged that the action of Sackett against Root was a collusive action brought and maintained by the plaintiff in that action for his own benefit and in fraud of the rights of the bondholders, and that there is no evidence offered by the plaintiff showing or tending to show any such fraud or collusion on the part of the plaintiff or any one connected with the matter. This motion was also denied and each one of the defendants duly excepted. (Record, p. 433.)

The decree of the United States Circuit Court in the case of the Central National Bank of Boston against Foster, Hazard and others, being the same as annexed to the answer of the Central National Bank, was given in evidence by the certificate holders. (See record, p. 448.)

It was admitted on the trial that under the decree in the action of the Central National Bank of Boston against Foster, Hazard and others, the property that had been formerly of the Lebanon Springs Railroad Company, was advertised for sale on the 19th day of May, 1889; that the property described in the complaint in this action has since been advertised and is still advertised for sale under that decree; that the Central National Bank of Boston and the other certificate holders received the back interest on their certificates out of the $155,000 consideration paid by Foster and Hazard under the judgment in the Sackett suit, and that the payments of interest made up to January 1, 1891, were made by the defendant William Foster, Jr.; also that defendant Foster has paid on account of principal of the certificates held by the Central National Bank of Boston, Peter Butler, as receiver of the Pacific National Bank, and the Massachusetts Mutual Life Insurance Company, the sum of $65,000. (Record, pp. 462, 463.)

The referee's deed dated August 29, 1885, between George McClellan, referee in the Sackett suit, of the first part, and William Foster, Jr., and Rowland N. Hazard of the second part, reciting the judgment in the Sackett suit and the sale of the premises described in said judgment for the sum of $155,000 to the parties of the second part, and the confirmation of the referee's report of sale, and

conveying to the said parties the property and franchises described in the judgment in the Sackett suit, was put in evidence by the counsel for the certificate holders. (See record, pp. 467, 468.)

It was also stipulated in writing that the pleadings in the suit of the Central National Bank of Boston against Rowland N. Hazard and others, brought in the New York Supreme Court and transferred to the United States Circuit Court, and also the report of the special master in said suit, dated February 7, 1888, be considered as in evidence the same as if they had been offered on the trial by the certificate holder defendants, subject to any objections to be specified that might then have been made thereto. (Record, p. 468.)

The pleadings and proceedings, including the report of the master *pro hac vice*, in the Central National Bank suit, may be found pages 469 to 490 of the record.

BRIEF INTRODUCTORY STATEMENT.

The controversy here is between holders of receiver's certificates, who claim a lien upon the Lebanon Springs Railroad under an order of the New York Supreme Court and a decree of the Circuit Court of the United States for the Northern District of New York, on the one hand, and bondholders of the Lebanon Springs Railroad, claiming a

lien upon the same property under a judgment of the New York Supreme Court, on the other.

The case is this:

In 1880 one John W. Van Valkenburgh was appointed receiver of the property of the Lebanon Springs Railroad Company in New York by the New York Supreme Court, in a suit brought by one Sackett claiming to be a holder of the bonds of the Lebanon Springs Railroad and suing in behalf of all the bondholders. In 1881 the receiver was authorized and directed by order of the court to issue receiver's certificates to an amount of $350,000, dated April, 1881, and payable in 5 years with interest at the rate of 6 per cent., and it was provided that the certificates should be a first lien upon the railroad and its property. (See order, pp. 30, 31 & 32 of record.) The receiver did issue and negotiate these certificates and the Central National Bank became the owner for value of $250,000 of such certificates.

In 1884 the Sackett suit was brought to trial and judgment rendered therein in January, 1885, adjudging the receiver's certificates to be a valid and first lien upon the property and directing a sale of the property for the benefit of the bondholders, but that such sale should be made subject to the payment of the undue principal and interest of the certificates and the expenses of the suit.

A sale was made by the referee on the 12th of

June, 1885, to William Foster, Jr., trustee, for the sum of $155,000, which sum was just sufficient to pay the expenses of the suit, fees of the receiver, etc., and the interest on the receiver's certificates.

After the sale, one William V. Reynolds, who had succeeded Van Valkenburgh as receiver, brought suit in the New York Supreme Court against the Central National Bank to have the certificates declared void and demanding judgment that such certificates were of no force and validity, and that the same be delivered up to the plaintiff, as receiver, to be cancelled, but the court directed the receiver to discontinue his suit against the bank, and judgment was thereupon rendered in favor of the said bank against the said Reynolds, as receiver. (See 49th finding, p. 502.)

The principal of the certificates became due in April, 1886, and was not paid, whereupon the Central National Bank brought an action in the New York Supreme Court against Foster and his grantees to have the certificates established as a first lien upon the property and for a sale of the property to satisfy the certificates and a judgment for any deficiency against the defendants. This suit was removed to the United States Circuit Court on petition of the defendants, and that court, in 1887, rendered its decree, adjudging the certificates to be a first lien upon the property and directing a sale to satisfy the principal and unpaid interest of the

certificates, and decreeing that Foster and the other defendants pay to the certificate holders any deficiency.

After this decree and before any sale had been had pursuant to it, one Stevens, claiming to be a holder of a bond of the Lebanon Springs Railroad Company, brought a suit in the New York Supreme Court to have the judgment in the Sackett suit declared null and void and set asde and to have it adjudged that the receiver's certificates issued in that suit were beyond the power of the court to issue.

This Stevens' case was tried twice in the New York Supreme Court, and in December, 1891, judgment was entered vacating, reversing and setting aside the judgment in the Sackett suit and all orders and proceedings therein, and restraining all owners of certificates from bringing any action or suffering any to brought in any court to enforce the lien upon or for the sale of the property, and enjoining the Central National Bank and the other certificate holders from proceeding with the sale under the decree of the Circuit Court of the United States, or suffering the same to proceed and directing a sale of the property for the benefit of the bondholders of the Lebanon Springs Railroad Company.

It is these provisions of the judgment of the State court preventing the certificate holders from availing themselves of their decree in the Federal Court and depriving them of the benefit thereof, in which it is claimed there is error to be corrected here.

MORE DETAILED STATEMENT OF FACTS.

Without undertaking to state all the matters of fact which are found by the court below, counsel for the plaintiffs in error submit the following as substanitally all which are thought to bear upon the questions which are brought by the writ of error before this court:

The Lebanon Springs Railroad Company was organized in the year 1852. By virtue of various acts of the legislatures of Vermont and New York, it became vested with all the powers, franchises, rights and privileges of a railroad corporation of the State of New York and became possessed and the owners of certain real and personal property described in the decision and judgment. (Printed record, pages 88 to 92.)

On the first day of July, 1867, it duly issued and sold to a great number of parties its bonds of the denomination of $1,000 each, to the amount of $2,000,000, bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal to become due in thirty years from date. (Pages 92, 295, 492.)

To secure these bonds it executed and delivered to the Union Trust Company of New York its mortgage upon all its property, rights, powers and franchises. (Pages 92, 492.)

Default was made in the payment of interest upon

these bonds, and by reason of a condition in the bonds and the mortgage, the whole principal sum secured by the mortgage became due on the first day of January, 1870. (Sixth finding, p. 492.)

In January, 1870, the Lebanon Springs Railroad Company consolidated its road, franchises and property with the road, franchises and property of the Bennington and Rutland Railroad Company, and one company was thereby formed of said two companies under the name of the Harlem Extension Railroad Company. (Pages 93, 94.) This company also executed bonds to the amount of $4,000,000, of which only $1,500,000 were issued, secured by mortgage to the Union Trust Co. on the same property. (P. 94.)

No interest was paid upon said bonds, either by the Lebanon Springs Railroad Company or the Harlem Extension Railroal Company after January 1, 1870. (Ninth finding, p. 493.)

The Union Trust Company commenced an action to foreclose the said first mortgage February 22, 1872, making the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan and James B. Hodgkins defendants in the action, in which judgment of foreclosure and sale was duly rendered December 10, 1872 (see copy judgment, pp. 96 to 98), and under said judgment all the powers, rights and franchises therein described were sold January 25, 1873, by

Charles S. Fairchild, referee, and were bid off by William Butler Duncan for the sum of $100,000. (Tenth finding, p. 493.)

On the same day, by the direction of Duncan and without the knowledge or consent of the bondholders, the premises so bid off by him were conveyed by said referee to James C. Hull, the clerk of Duncan, who was not present at the sale, by a deed of conveyance, which was duly recorded in the clerk's offices of the counties of Rensselaer and Columbia. (Eleventh finding, same page.)

No part of said purchase price of $100,000 was ever paid by Duncan or Hull or any other person, and no money or other valuable thing was paid on account of said sale, except that the plaintiff's taxable costs and the referee's fees on foreclosure were paid by some person. (Twelfth finding, same page.)

About the same time the Union Trust Company commenced an action, in the State of Vermont, against Harlem Extension Railroad Company and the Lebanon Springs Railroad Company to foreclose said mortgage, which action proceeded to decree of sale December 6, 1872. (See copy decree, pp. 98 to 100.) One Daniel McEowen was appointed a special master in chancery to make such sale, and he sold the property of said companies within the State of Vermont to Trenor W. Park for the sum of $25,000, and by direction of

Park the said special master executed and delivered a deed of said property to one Charles G. Lincoln, which was duly recorded in Vermont. No part of said $25,000 was ever paid by Park or Lincoln or any other person. (Thirteenth finding, pages 493, 494.)

Neither the plaintiff nor any of the bondholders of the Lebanon Springs Railroad Company, except, perhaps, William Butler Duncan and Trenor W. Park, had any knowledge or information of the said conveyances to Hull and Lincoln, or of the non-compliance with the terms and conditions of the sale, and the non-payment of the purchase money, or of any of the subsequent acts or transactions with respect to the property, until about the time of the commencement of an action in the New York Supreme Court, in which Marvin Sackett was plaintiff, and Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver of the last named company, were defendants, which action was commenced in the year 1880. (Fourteenth finding, p. 494.) This action will be hereafter for convenience referred to as "the Sackett suit."

January 30, 1873, Hull and his wife conveyed the premises which had been conveyed to him by Fairchild, referee, to the New York, Boston and Montreal Railroad Company for the nominal consideration

of five dollars, which deed was duly recorded in Rensselaer and Columbia counties. (Sixteenth finding, p. 494.)

Afterwards, Lincoln conveyed the premises, rights and franchises conveyed to him by the special master in Vermont to the same company for a like nominal consideration, and his deed was duly recorded in Bennington county, Vermont. (Seventeenth finding, pp. 494, 495.)

Afterwards, the New York, Boston and Montreal Railroad Company became, and is, utterly insolvent, and Daniel Butterfield was duly appointed by this court receiver of all and singular its property, rights and franchises. (Eighteenth finding, p. 495.)

Neither the New York, Boston and Montreal Railroad Company nor the said Butterfield ever took possession or used or occupied the said Lebanon Springs Railroad or any of its franchises, or claimed to exercise any control over the same, or to possess any right thereto in connection therewith, and never paid any sum or sums whatever as a consideration of the said pretended transfer; but, on the contrary, they abandoned the same, and although said receiver was made a party defendant in the Sackett suit, he made no claim to any right or property therein, and judgment by default was entered as against said receiver. (Nineteenth finding, same page.)

From about the time of the insolvency and the

appointment of a receiver of the New York, Bosto and Montreal Railway Company, and after its abandonment by the said company and its receiver, down to the commencement of the Sackett suit, the said road, its property and franchises had been used and occupied by persons having no right or authority so to do. The last two occupants were the said Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company, which were defendants in the Sackett suit. Neither of said last named parties ever had or claimed to have any authority or right to use or occupy the said railroad, or its property, derived from any person or persons having the right to grant such authority. (Twentieth finding, same page.)

The Sackett suit was commenced at the request and with the concurrence of holders of Lebanon Springs Railroad Company bonds, owning bonds amounting to about $1,200,000 at their face value, and counsel retained, acting for such bondholders to the amount of about $1,200,000, drew the original complaint in said action, at the request and with the concurrence of said bondholders, including Sackett. (Twenty-second finding, pp. 495, 496.)

During the pendency of the Sackett suit, certain persons claiming to hold, and actually holding, a majority of the bonds of the Lebanon Springs Railroad Company applied by petition to the court to be made parties to said action, either as co-

plaintiffs or as co-defendants. This petition was presented to the court at Special Term, and a motion made that the prayer of said petition be granted, but the court denied the motion, the justice before whom the motion was made making a memorandum of his decision, stating that the plaintiff should not be embarrassed by having united with him on the record parties whose case he might not be able to sustain, but that these parties should have notice of every step in the case, so they might protect their interests, and that an order should be made requiring all papers and notices to be served upon Mr. F. L. Westbrook, and allowing him, as counsel, to appear on trials, hearings and motions.

This memorandum was dated December 28, 1880. (Twenty-third finding, p. 496.)

Thereupon the attorney of the petitioners drew an order in pursuance of said decision, which was duly filed and entered, and by which it was ordered that the plaintiff's attorneys should serve copies of all papers and notices of every kind upon F. L. Westbrook, of Kingston, and he was authorized and allowed to appear as counsel in behalf of the petitioning bondholders. (See twenty-fourth finding, pp. 496, 497.)

Frederick L. Westbrook, who was named in said order, was a counselor-at-law and had been employed as counsel for said petitioning bondholders, and had appeared for them upon the presentation

of the petition and upon the argument of the motion; and upon the argument of the motion it was understood and agreed, between the attorney for said petitioners, Lyman B. Bunnell, and said Frederick L. Westbrook, that the latter should be the person designated in said order upon whom such notices should be served. (Twenty-fifth finding, p. 497.)

One Edward Crane, during the pendency of the Sackett suit, was the owner of bonds issued by the Lebanon Springs Railroad Company amounting to between $500,000 and $700,000 face value, and while the owner of such bonds was consulted in regard to said suit, and was represented in the Sackett suit by the attorney and counsel who conducted the suit in the name of said Sackett. (Twenty-seventh finding, p. 497.)

None of said petitioners appealed from the order denying the motion to make them parties. (Twenty-ninth finding, p. 498.)

In the Sackett suit, John W. Van Valkenburgh was, on the 1st day of October, 1880, appointed receiver of the Lebanon Springs Railroad Company, its property and franchises, and, in or about November, 1880, qualified and entered upon the discharge of his duties as such receiver. (Thirtieth finding, p. 498. See order appointing receiver, pp. 206 to 209; certificate of filing security, pp. 209, 210.)

Said Van Valkenburgh, soon after his appointment in the Sackett suit, took possession of the

railroad and property of the Lebanon Springs Railroad Company, and continued in the possession thereof; and continued in possession and to operate said railroad as such receiver until his resignation and the appointment of his successor. (Thirty-third finding, p. 499.)

Upon his appointment, the receiver found that there was no rolling stock or means of operating the road, or making necessary repairs, and thereupon, to relieve the immediate pressing necessity, the court ordered the issue of $25,000 par value of receiver's certificates, and afterwards, upon the further representations of the receiver of the condition of the road and its wants, an engineer expert was appointed by the court to examine into the condition of the road. Upon that report being presented, it appearing that a larger sum of money was necessary to preserve and protect the property and keep it running, the court ordered the issue of $350,000 face value certificates, $25,000 to be used to repay the first $25,000, and the other $325,000 to be used for the necessary wants of the road and its preservation. The order so made was the same as Exhibit A, annexed to the answer of the Central National Bank, and was dated April 2, 1881. (See order, pp. 31, 32; thirty-fourth finding, pp. 499, 500.)

Certificates of indebtedness, amouting in the aggregate to $350,000, were issued and negotiated by

the receiver pursuant to said order. These certificates were in the form of Exhibit B annexed to the answer of the Central National Bank. (See pp. 33, 34; thirty-fifth finding, p. 500.)

The Central National Bank became the purchaser for value of said receiver's certificates to the amount of $250,000, which it still holds and owns. (Thirty-sixth finding, p. 500.)

The receiver, after his appointment, made diligent inquiry to ascertain the names and residences of the holders of the Lebanon Springs Railroad bonds, and notified, by letter, such bondholders as he could ascertain of his appointment as receiver. (Thirty-seventh finding, same page.)

The Sackett suit was brought to trial at a Sepcial Term of the court. After said trial, the court filed its decision, dated December 13, 1884, by which it found substantially the facts stated in the findings found at the request of the plaintiffs in error, from the first to the nineteenth, inclusive, except the seventeenth finding of fact, and also found, as conclusion of law, that the purchase by Duncan was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them; that the conveyance by the referee to Hull, in accordance with the directions of Duncan, merely vested the title in Hull as trustee for the bondholders; that the conveyance by Hull and wife to the New York, Boston and Montreal Rail-

way Company was wholly ineffectual to pass any title to said company, or to divest the bondholders of any title therein, and that the title to, and beneficial interest in, the railway company, its rights and franchises, was continued to be, and still was, in the bondholders of the Lebanon Springs Railroad Company, and that the property and franchises and powers of said company, as described in the mortgage to the Union Trust Company, and all of the right, title and interest of any and of all the parties to the action be sold at public auction, and that all parties be barred and foreclosed of all right, title and interest in said property; that a referee be appointed to make such sale, and that, in the decree or judgment to be entered in the action, such clause or clauses should be inserted therein as, in the judgment of the court, might be necessary to protect holders of receiver's certificates. Judgment in said action was rendered January 12, 1885, and filed in the Rensselaer county clerk's office. A copy of the judgment is annexed to the answer of defendants, Royal E. Robbins and others, marked "Exhibit A," except that the judgment contained a full description of the mortgaged premises described in the complaint in this action. (See Exhibit "A," pp. 51 to 53; thirty-eighth finding, pp. 500, 501.)

There is no evidence in the case that Stevens, the original plaintiff, nor any or either of the other

plaintiffs brought in during the progress of this action, or their predecessors, owners of the bonds presented in this action by the plaintiffs, were not represented by counsel in the Sackett suit, or that they, or either of them, did not have full notice and knowledge of all the proceedings in the Sackett suit. (Forty-third finding, p. 502.)

June 25, 1883, William V. Reynolds was appointed as receiver of the Lebanon Springs Railroad Company, in place of Van Valkenburgh. After the sale under the judgment in the Sackett suit, Reynolds, as receiver, brought an action against the defendant, the Central National Bank of Boston, claiming and alleging that the said bank was not the holder and owner of the said certificates amounting to $250,000, but had wrongfully obtained possession of the same, and alleging that said certificates and the coupons annexed thereto were wholly void, and had no force or validity against the receiver and the bondholders whom he represented, and demanding judgment accordingly; but afterwards, upon the motion of the defendant, an order was made directing and requiring said Reynolds, as receiver, to discontinue said action, and on the 28th day of November, 1885, judgment was rendered in said action in favor of the defendant, the Central National Bank, against said Reynolds, as receiver. (Forty-fourth finding, p. 502.)

Under the judgment in the Sackett suit, the rail-

road and property of the Lebanon Springs Railroad Company was sold to the defendants Foster and Hazard for $155,000, which was paid by them, and the usual referee's deed of the said railroad and property was made and delivered to them, and they were put in possession of said railroad and property and remained so in possession until they delivered possession of the same to the defendant, the New York, Rutland and Montreal Railway Company, and, by orders of the court, the said receivership was terminated and the receiver discharged. (See allegation in the complaint, paragraph 25, p. 21, admitted by the answer of plaintiffs in error, par. 12, page 25.)

Out of the said sum of $155,000, the purchase price of said premises, paid by Hazard and Foster, the interest due and unpaid upon the receiver's certificates held by the Central National Bank, the Massachusetts Mutual Life Insurance Company, and the receiver of the property of the Pacific National Bank, was paid and the balance of the purchase money was used and applied as directed by the judgment in the Sackett suit. (Forty-fifth finding, pp. 502, 503.)

When the principal of said certificates became due, April 1, 1886, it was not paid, and thereupon the defendant, the Central National Bank of Boston, brought an action in the New York Supreme Court in behalf of itself, as well as other holders of re-

ceiver's certificates similarly situated, against Hazard and Foster, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company, as defendants. The defendants all answered. After issue was joined, the action was removed by the defendants therein into the Circuit Court of the United States for the Northern District of New York. After such removal, testimony was taken in behalf of all the parties, and the suit was finally brought to a hearing, and a decision and decree were made therein, of which a copy is annexed to the answer of the defendant, the Central National Bank, marked C. (See pp. 34 to 37.) In pursuance of the said decree of the United States Circuit Court, the referee named therein advertised the property for sale, being the same premises described in the complaint in this action. (Forty-sixth finding, p. 503.)

Since the rendering of said decree in the United States Circuit Court, the defendants named as certificate holders in this action (plaintiffs in error) have duly appeared before the master *pro hac vice*, appointed by the decree, and produced their certificates, and made proof of their title thereto and the amount due thereon. (Forty-seventh finding, p. 503.)

The defendant, James C. Hull, paid no consideration for the conveyance made to him by Charles S. Fairchild, referee, in the foreclosure suit. (Forty-eighth finding, same page.)

No consideration was paid by the defendant, Lincoln, for the deed executed to him in the Vermont suit. (Forty-ninth finding, same page.)

The mortgage executed by Hull and wife and Lincoln to Duncan and Park, purporting to be to secure the payment of $5,000,000, was entirely without consideration as between the parties thereto, and there was at the time of the execution of said mortgage no indebtedness whatever existing from the said mortgagors to Duncan and Park, the mortgagees therein named. (Fiftieth finding, pages 503, 504.)

The sale under the judgment in the Sackett suit was made on the 12th day of June, 1885. At that sale the said premises, franchises and property were fairly struck off to William Foster, Jr., trustee, for $155,000. (Fifty-second finding, p. 504.)

The amount of this bid was paid and the usual referee's deed given. (Complaint, par. 25, p. 21; answer of certificate holders, par. 12, p. 25.)

Most of the above facts were found in pursuance of requests made by the counsel for the plaintiffs in error. Other facts, to which the attention of the court will hereafter be called, were also found in the decision above referred to. Upon the facts above mentioned and the others found in the decision, the judgment of the New York Supreme Court, which was affirmed by the Court of Appeals and is now before this court for review, was rendered.

The adjudicating part of this judgment so far as material to the argument of the writ of error is as follows:

It is now, on motion of Campbell and Paige, attorneys for the plaintiffs, adjudged,

. . . . . .

That all owners of any of the certificates hereinbefore described as issued by the receiver, Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them.

That the judgment in the action above mentioned brought in this court by the defendant, Marvin Sackett, against Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield, its receiver, entered in Rensselaer county and dated January 12, 1885, and all orders and proceedings in that action, and the sale by the referee under such judgment, and the deed of the referee under such judgment and pursuant to such sale to the defendants Foster and Hazard, be and they hereby are reviewed and in all things reversed, vacated, set aside and held for nothing.

That the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Ester K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and the American Loan and Trust Company, and all other owners of certificates issued by the said Van Valkenburgh, as receiver as aforesaid, and each of them and their and each of their officers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, The Central National Bank of Boston against the defendants, Hazard, Foster, The New York, Boston and Montreal Railway Company and the American Loan and Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sale to proceed in their or any of their names, or behalf.

That the judgment and decrees of 1872 be now enforced.

That all the premises, property, franchises and powers hereinafter described be sold together and not separately at public auction in the county of Rensselaer by or under the direction of John L. Henning, of Saratoga Springs, counselor-at-law, who is hereby appointed as referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the

practice of this court; that either or any of the parties to this action may purchase at such sale; that the referee execute to the purchaser or purchasers a deed of the property, premises, franchises and powers sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses upon such sale and any lien or liens upon the same for taxes, he pay to the plaintiffs or their attorneys the sum of eighteen hundred and seventy-five dollars hereby adjudged to the plaintiffs for their costs, together with the sum of two thousand dollars allowed to the plaintiffs by the court for an additional allowance.

. . . . . .

That the referee, after the payment of the amount of his fees and expenses and the taxes and costs and allowances as aforesaid, shall pay to the holders of the Lebanon Springs bonds the amount found to be due upon their respective bonds, as it shall be established by the report of such referee confirmed by the court, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit, as the same shall be found by such report as confirmed, he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy the same as the same shall be found by the said report so confirmed, and the balance to the holders of such bonds.

. . . . . .

The aforesaid shall be made subject to a debt which the receiver has been authorized to contract to the amount of twenty thousand dollars, and to no other lien or charge whatever.

. . . . . .

That the said referee also ascertain, determine and report, from the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of the said certificates issued by the receiver, Van Valkenburgh, and how much has been paid upon said certificates, and the said referee is hereby authorized and directed to give notice by advertising in two daily newspapers published, one in the city of Troy called the Troy Press, and one in the city of New York called the New York Tribune, requiring the said holders of said bonds and said certificates to produce the same before the said referee at his office in Saratoga Springs, or such other place, and at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto and the amount due thereon.

This judgment was affirmed by the General Term and by the Court of Appeals on appeal. It appears by the record that a motion was made in the Court of Appeals which was stipulated to be heard with the appeal, on behalf of the plaintiffs, and of Edward Winslow Paige, as attorney for the L. S. R. Co., for the dismissal of the appeal to that court, and the affirmance of the judgment (p. 519), such motion being based upon a resolution purporting to be passed by the board of directors of the Lebanon Springs Railroad Company, and upon a deed to William Foster, Jr., executed by the referee mentioned in the decree in the U. S. Circuit Court suit,

dated April 25, 1892, and a deed from William Foster, Jr., and his wife to the Lebanon Springs Railroad, dated June 9, 1893, which recites a deed made to said Foster by the referee appointed by the judgment of the Supreme Court of New York in this action, dated May 16, 1892, and another deed made to him by the New York, Boston & Montreal Railway Company, dated May 17, 1892, and another deed made to said Foster by Willam Butler Duncan and John G. McCullough, as administrator, &c., of Trenor W. Park, deceased, dated May 17, 1892, as well as the deed above referred to made by Worthington Frothingham, referee, to said Foster, dated April 25, 1892. (See pp. 520-527.) Upon this motion, an affidavit was filed by Alpheus T. Bulkeley, one of the attorneys for the appellants in the Court of Appeals (plaintiffs in error here), from which it appears that after the rendition of the judgment in this action, William Foster, Jr., one of the defendants herein, brought another action in the New York Supreme Court against the Central National Bank of Boston and other defendants, in which the complaint prayed, among other things, that as to so much of the decree of the Circuit Court of the United States, dated March 24, 1887, as orders, adjudges or decrees that the said William Foster, Jr., either alone or with Rowland N. Hazard, pay to the said Central National Bank of Boston and the other certificate holders, the residue

of the indebtedness on said certificates remaining unsatisfied after the sale of the property, plaintiff may have the same annulled and the enforcement thereof perpetually enjoined and that so much of the decree as adjudges that the Central National Bank of Boston and the other certificate holders have execution for the residue or any part of such indebtedness, the plaintiff asks to have the same annulled and the enforcement thereof perpetually enjoined, and that defendants (plaintiffs in error here) and each of them, their attorneys, counsel, &c., be perpetually enjoined and restrained from issuing any execution against the plaintiff or his property; that the complaint of the said William Foster, Jr., plaintiff in said action, sets forth among, other things, the judgment in this action, and that Mr. Justice Putnam of the New York Supreme Court had granted a temporary injunction, enjoining and restraining the said Central National Bank of Boston and the other certificate holders firm issuing execution under the said decree of the Circuit Court of the United States, for the purpose of enforcing payment or collection of any of said certificates; that said action brought by said Foster had been duly removed on the petition of the Central National Bank of Boston into the Circuit Court of the United States for the Northern District of New York, and that since such removal, the said Circuit Court has vacated the injunction therein granted

by Mr. Justice Putnam, and the said action is now pending and undetermined in the Circuit Court of the United States; that in said action wherein said Willam Foster, Jr., is plaintiff, now pending in the said U. S. Circuit Court, the said Central National Bank of Boston has set up and claimed that the Supreme Court of the State of New York has no jurisdiction to deprive the said bank and the other certificate holders in that suit of the benefit of the decree rendered in their favor by the Circuit Court of the United States, but that it is contended and claimed by the counsel for the said Foster in said suit that the sale of the premises described in the complaint is void for the reason that the same was made in disobedience to the said injunction contained in the judgment in this action, and that one of the grounds upon which the said William Foster, Jr., is seeking in said action to perpetually enjoin said Central National Bank of Boston and the other certificate holders from issuing execution against him, is that the sale of said premises is void for the reason above stated, and therefore the said Central National Bank of Boston had no right to issue execution against said Foster, said right under said decree depending upon a legal and valid sale having taken place of the premises described in the bill of complaint. The said suit in which William Foster, Jr., is plaintiff is now pending in the Circuit Court of the United States for the Northern District of

New York. (See Mr. Bulkeley's affidavit, pp. 528 to 530 of the record.)

It does not appear that this motion was ever decided by the Court of Appeals. The affirmance of the judgment above referred to by said Court of Appeals was made upon the argument of the appeal from the judgment and without reference to the motion. (See statement as to judgment of Court of Appeals, transcript, p. 530 print, original 845.)

ASSIGNMENT OF ERRORS.

The following are the errors assigned by the plaintiffs in error which will be insisted on upon this argument:

1. That the court below erred in that it did not give due validity and effect to the said decree of the Circuit Court of the United States in and for the Northern District of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated, was complainant, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company of New York, were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said court also erred in perpetually

enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the Circuit Court of the United States above referred to.

3. That the said court also erred in enjoining and restranining all owners of any of the certificates described in said judgment as issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants and attorneys, from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them.

4. The said court also erred in requiring the referee named in the said judgment to ascertain and report from the evidence taken upon the trial in said action, and the findings of the court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and The Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said court also erred in providing in the said judgment that the said referee therein named, ascertain, determine and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates

issued by the said receiver, Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained and determined by the said Circuit Court of the United States in and under the decree of the said Circuit Court of the United States, above referred to.

6. The court below also erred in that by its judgment it required the holders of the said certificates, including the plaintiffs in error, to produce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon; whereas the said facts as to the title to said certificates and as to the amount due thereon, had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States above referred to.

7. The court below also erred in refusing to find as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Valkenburgh, as receiver, and held by the defendants, The Central National Bank of Boston, Peter Butler, as receiver of the property of The Pacific National Bank of Boston, The Massachusetts Mutual Life Insurance Company and the other persons who have appeared before the master *pro hac vice*, and produced their certificates, are as against all the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint as adjudged by the Circuit Court of the United States by its decree in the suit of The

Central National Bank of Boston v. Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the master *pro hac vice* named in said decree, and as reported by said master.

8. The court also erred in refusing to find as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action, such sale should be subject to the rights of the defendant, The Central National Bank of Boston, and the other defendants, holders of receiver's certificates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein.

And that the said Court of Appeals should have reversed so much of the judgment of the Supreme Court of the State of New York, as in any way impairs the rights of the plaintiffs in error or any or either of them under the said decree of the said Circuit Court of the United States, or in any way enjoins, restrains or prevents the plaintiffs in error, or any or either of them, from enforcing the said decree of the said Circuit Court of the United States, or from having and enjoying the full benefit thereof; but that the said Court of Appeals in fact decided the contrary, to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the Supreme Court of the State of New York. (See assignment of errors, record, pp. 543 to 546.)

GENERAL CONTENTION OF PLAINTIFFS IN ERROR.

THE COURT OF APPEALS OF THE STATE OF NEW YORK, AS WELL AS THE SUPREME COURT OF THAT STATE, FAILED TO GIVE DUE EFFECT TO THE DECREE OF THE CIRCUIT COURT OF THE UNITED STATES IN FAVOR OF THE PLAINTIFFS IN ERROR.

The above proposition states the general ground upon which the writ of error in this case has been applied for and issued. Before discussing in detail the different points arising under this general proposition, it will perhaps be profitable to state concisely, (1) the history of the suit in which the decree of the United States Circuit Court was obtained, and (2) to point out the manner in which the judgment of the State court undertakes to interfere with and destroy the rights of plaintiffs in error under the said decree of the United States Court.

History of the suit in which the United States Circuit Court decree was rendered.

This suit was brought in the Supreme Court of the State of New York by the plaintiff in error, The Central National Bank of Boston, as plaintiff, suing as well on behalf of itself as all others similarly situated. The complaint of the plaintiff in that

suit may be found on pages 469 to 474 of the record. The defendants in that suit were Rowland N. Hazard, William Foster, Jr., The New York, Rutland & Montreal Railway Company and the American Loan & Trust Company. The complaint alleges in substance that the plaintiff is a banking association duly organized and incorporated under the laws of the United States, located and doing business in the city of Boston, in the commonwealth of Massachusetts. It alleges the making of an order on or about April 2nd, 1881, by the New York Supreme Court in the Sackett suit, whereby one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, was authorized and directed to issue under his hand, receiver's certificates of indebtedness, dated April 2nd, 1881, with interest at six per cent. of $500 each payable in five years, interest payable January 1 and July 1 in each year, to the aggregate amount of $350,000, such certificates and the interest coupons thereto attached made payable at the Farmer's Loan & Trust Company in the city of New York, and whereby it was further ordered that the receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon pay and discharge certain previous certificates theretofore authorized by an order of the same court, and from the moneys arising from said certificates, that said receiver purchase all necessary materials for

the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found due to claimants by the referee named in said order; that it was further provided in said order that the said receiver's certificates of indebtedness to the amount therein directed to be issued, be and the same were thereby declared to be a debt of the said receiver incurred for the benefit and protection of the said Lebanon Springs Railroad and its owners and bondholders, and said certificates to the amount of $350,000 were by said order declared to be a first lien on the railroad and all and every kind of property owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any re-organization of the company, and that in case of any sale of the railroad, the property in the hands of the receiver, and franchises under any decree of the Supreme Court, said certificates were to be first paid from the first moneys realized therefrom by said receiver, unless sooner paid and cancelled by him from the earnings of said railroad. It was further provided in said order that in case said railroad property in the hands of the receiver and franchises on any sale thereof, should not bring sufficient to pay the full amount

of principal and interest then due on the outstanding negotiated certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver, and franchises, should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid with interest thereon, referring to the original order or the record thereof.

The complaint further alleges that the said Van Valkenburgh, as receiver, under and in pursuance of said order, did issue and negotiate such certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from said certificates to the uses and purposes mentioned and in said order authorized; that the plaintiff is now and has for several years last past been the owner and holder of said certificates amounting in the aggregate to $250,000 of principal thereof, and that the certificates issued and negotiated by the receiver which are not held by plaintiff, are held by divers persons and corporations, many of whose names are unknown to the plaintiff.

The complaint further alleges that in the said Sackett suit, the plaintiff appeared by its attorneys on the trial of the issues and made proof in regard to the issuing of said certificates and its title thereto and that such proceedings were had therein, that a judgment was rendered on or about January

12, 1885, by which it was, among other things, adjudged and decreed that the said certificates, amounting in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the railroad and its property, as provided in the said order, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in said judgment provided for, and whereby it was further adjudged and decreed that the property, franchises and rights of the said railroad company as described in a certain mortgage therein referred to, and in the judgment in said Sackett suit, and all the right, title and interest of any and of all the parties to the said action, including all property and assets in the hands of said receiver be sold at public auction under the direction of a referee therein named for the benefit of the first mortgage bondholders of said railroad company issued July 1, 1867, for the amount of $2,000,000, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and should assume as part of the consideration of the purchase, the payment thereof, and from the avails of said sale, after the payment of certain expenses therein provided

for, the said referee should pay the amount of interest due on said receiver's certificates; that under and in pursuance of said judgment, the referee named therein did advertise for sale on the 12th day of June, 1885, and did sell at public auction the premises, rights, franchises and property in said judgment mentioned and described, to the defendants, William Foster, Jr., and Rowland N. Hazard, who became the purchasers thereof for the price of $155,000, and that the said William Foster, Jr., acting on behalf of himself and said Hazard, did pay the referee five per cent. of the purchase price and did subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did for himself and said Hazard, assume and agree to pay the amount of unpaid principal and interest on said certificates of indebtedness as part of the consideration of such purchase; that the balance of said $155,000 was thereafter paid by the purchasers to the referee, and that the referee did thereafter duly execute and deliver to the defendants, Foster and Hazard, a deed of said premises and property in said judgment described, and paid from the said $155,000 the interest then due on said certificates, amounting to about $60,000.

Plaintiff further alleged in said complaint that said referee's deed was duly accepted by the defendants, Foster and Hazard, and that in and by

the deed, the grantees therein, the defendants, Hazard and Foster, took said premises and property subject to the unpaid principal and interest on the receiver's certificates, as required by the judgment aforesaid; that the principal of said certificates with interest from January 1, 1886, became due and payable on the 2nd day of April, 1886, and that on that day the said certificates, amounting to $250,000 held by the plaintiff, were duly presented to the Farmer's Loan & Trust Company of the city of New York, where the same were payable and payment thereof was demanded, but the same was refused, and that the whole of said principal with interest from the 1st day of January 1886, is now due and unpaid. The complaint then gives a description of the railroad premises mentioned in the judgment in the Sackett suit and in the referee's deed; alleges that the defendants or some one of them are now in possession of the paoperty above described, and are using and operating the same for railroad purposes, and that all the defendants have or claim to have some interest in or lien upon said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said certificates, and that there is now justly due the plaintiff upon said certificates held by it, the sum of $250,000 with interest from January 1, 1886.

The complaint then prays that the unpaid principal and interest of said receiver's certificates may

be adjudged to be a lien upon said premises; asks for the usual judgment of foreclosure, for a receiver and for a sale, and that out of the moneys arising from the sale of said premises, plaintiff and other holders of said certificates who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates with interest and costs, so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants, Hazard and Foster, may be adjudged to pay any deficiency that may remain after applying said moneys so applicable thereto, and for general relief.

The defendants all appeared and answered. Hazard and Foster answered separately by their attorneys Vanderpoel, Green & Cuming, admitting their purchase susbtantially as alleged in the complaint, controverting some of the other allegations and setting up as a distinct defence that they acquired the property mentioned in the plaintiff's complaint with notice that the receiver's certificates were outstanding and of the sum justly due therefor, and that they have ever since been and now are ready and willing to pay the sum justly due on account of said receiver's certificates, but that they are advised and believe that the plaintiff is not entitled to receive payment thereof; that when the said property came into the hands of these defendants, it was subject to a lien for the amount actually due from the receiver and his successor in the

trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants when they acquired the property succeeded to all the rights of the prior owners of the property as well as to their obligations; that in accepting the deed of the premises, they intended only to obligate themselves to pay the amount actually due the receiver on account of such certificates, with proper interest, and no other or greater sum by way of profit, and defendants aver that they incurred no greater or other obligations in the premises. (See their answer, pp. 474-476.)

The defendant, The New York, Rutland & Montreal Railway Company, also put in a separate answer by its attorney, Robert Ludlow Fowler (pp. 476-480). It alleged, among other things, that defendants, Foster and Hazard, had conveyed and transferred to it all the property and franchises conveyed to them by the referee in the Sackett suit subject to the payment of the sum justly due by said receiver, but not subject to any greater sum, and it controverts the allegations as to the amounts due on the receiver's certificates.

The American Loan & Trust Company, by Blair & Rudd, its attorneys, also answered separately, setting up that it was the holder of a mortgage executed to it by the New York, Rutland & Montreal Railway Company, and denying knowledge

or information as to the matters charged in the complaint.

This suit was afterwards duly removed on the petition of the defendants, all joining in the petition, into the Circuit Court of the United States for the Northern District of New York. (See petition, pp. 482-485.)

The case came on for a hearing on pleadings and proofs, and after full arugment, a decree was passed, of which the following is a copy (omitting the description which is the same as that contained in the complaint in this action):

> At a Special Term of the Circuit Court of the United States, in Equity sitting, held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the city of Syracuse, on the 24th day of March, 1887.

Present: Hon. William J. Wallace, Circuit Judge.

The Central National Bank of Boston, which sues as well for itself as for all others similarly situated,

vs.

Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew

Hale, of counsel for complainant, and by Messrs. Robert Ludlow Fowler and Thomas G. Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2nd day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants, Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant, The Central National Bank of Boston, is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000 of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than

the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said District, requiring the holdesr of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said District, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale,

after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid, together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys, after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of

such deficiency in his report of sale, and that the defendants, Rowland N. Hazard and William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining usatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and thereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants, William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein: (Description.)

Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take

immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases. WM. J. WALLACE.

NOTE.—We will hereafter in this brief, for the sake of convenience and brevity, refer to the decree of the U. S. Circuit Court in the suit wherein the Central National Bank of Boston was complainant, as the "Decree;" to the judgment of the New York Supreme Court, affirmed by the New York Court of Appeals and brought for review before this court by the writ of error in this case, as the "Judgment"

Afterwards William Lansing, Esq., the master *pro hac vice* appointed in and by the decree to examine, ascertain and report who are the holders other than the complainant of the said receiver's certificates, made his report, to be found on pages 486 to 490 of the record, from which it appears that the plaintiffs in error were such certificate holders.

Afterwards and before the commencement of this action, Worthington Frothingham, the referee named in the decree, duly advertised the premises for sale under and in pursuance of said decree.

Brief History of this suit.

The action now before this court was originally brought in the name of Aaron R. Stevens, as sole

plaintiff, on or about October 10, 1887. Other plaintiffs were afterwards brought in and the complaint amended. The complaint appearing in the record is the *fifth* amended complaint. (P. 3.) Upon the first trial of the action, before the Special Term of the New York Supreme Court, judgment was rendered against the plaintiffs below dismissing the complaint upon the merits, but that judgment on appeal was reversed by the General Term and a new trial ordered.

See Opinion Stevens v. Central National Bank et al., 57 Hun, 498.

The case was then tried again at another Special Term of the Supreme Court, before Mr. Justice Putnam without a jury, and the judgment was rendered which was affirmed by the Court of Appeals, and is now brought before this court by writ of error. That judgment bears date the 10th day of November, 1891. (P. 86.)

The complaint in this action alleges, among other things, the bringing of the action by the Central National Bank of Boston and its removal into the Circuit Court of the United States and the passing of a decree in that court, whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates. (P. 22, sub. 28.) It contains no other allegation with reference to that action or the decree

therein. It makes no prayer with reference to the decree in that action, or the enforcement thereof, except that it asks that it may be adjudged that the certificates issued by Van Valkenburgh, as receiver, were beyond the power of the court to issue, and are of no validity except to bind the interest represented by the eight bonds of the said Marvin Sackett, and the interest of the defendants in the action brought by said Sackett, and that all of the defendants in this action and all other persons be enjoined as well temporarily by order as permanently by judgment, from interfering with any part of the said railroad property. (P. 23.)

The decision in this action, among its conclusions of law, contains the provision "that the holders of the certificates issued by the receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds which were in the trial and judgment in the said suit by Marvin Sackett, represented by counsel actually retained by their owners." It also directs judgment, among other things, (1) perpetualy enjoining all suits to enforce any lien upon or to affect any of said property or franchises, or any interest therein by any of the holders of certificates issued by the receiver, Van Valkenburgh, their agents, attorneys and servants, and (2) adjudging in the usual form of a decree upon a bill of review, that the judgment and all proceedings in the Sackett

suit, including the sale thereunder, and the referee's deed, be now reviewed and reversed, and perpetually enjoining the sale in the suit by the Central National Bank of Boston. (Pp. 111, 112.)

The judgment in terms perpetually enjoins and restrains all owners of any of the receiver's certificates from bringing and from proceeding with any action or proceeding in any court whatever to enforce any lien upon or for the sale of or to affect any of the premises, property, franchises and powers therein described or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or *to be proceeded* with in the names of any of them, and also perpetually enjoining and restraining the plaintiffs in error naming them and all other owners of receiver's certificates, from proceeding with the sale under the decree in the action brought by the defendant, the Central National Bank of Boston against the defendants, Hazard, Foster, The New York, Boston & Montreal Railway Company and the American Loan & Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, *and from suffering the said sale to proceed in their or any of their names or behalf.* (P. 113.)

The judgment also appoints a referee and requires the referee to ascertain, determine and report from the evidence to be taken before him, and

the findings *and such other evidence as shall be furnished him*, who are the holders of said certificates issued by the receiver, Van Valkenburgh, and how much has been paid upon such certificates, and authorizes and directs the referee to give notice by advertising in two papers named, requiring said certificate holders to produce the same before the referee at his office in Saratoga Springs, or such other places as he shall designate, and make proof as to their title thereto and the amount due thereon. (P. 115.)

At the time this judgment was rendered in this suit, the referee appointed by the decree of the Circuit Court of the United States was still advertising the premises for sale under that decree. Application was made on behalf of Peter Butler, as receiver of the Pacific National Bank, the holder of some of the receiver's certificates, to the Circuit Court of the United States for an order requiring the referee named in the decree of the Circuit Court of the United States, to proceed with the sale notwithstanding the injunction contained in the judgment of the New York Supreme Court. This motion was granted by Judge Wallace, rendering a decision and sustaining it by an opinion which is reported 49 Fed. Rep. 293.

Afterwards, as appears by the record of the papers introduced by the defendants in error in the Court of Appeals on their motion to dismiss or affirm, the

premises were sold March 23, 1892, by the referee appointed by the United States Circuit Court decree, and William Foster, Jr., became the purchaser thereof for the sum of $7,500 and received a referee's deed thereof. (See deed, pp. 525-527.)

It appears also that the defendant Foster purchased under the judgment of the New York Supreme Court in this action, and received a deed from the referee dated May 16, 1892. (P. 524.)

It appears also that since the execution of the said referee's deeds to said Foster, the said Foster has brought an action in the Supreme Court of the State of New York against the plaintiffs in error in this action, in which all the proceedings in both the actions are set up and alleged, and wherein he prays for an injunction to restrain the plaintiffs in error, the Central National Bank and the other certificate holders, who are defendants in that suit, from issuing any execution against him to enforce his personal liability under the decree of the Circuit Court of the United States, which suit has been removed into and is now pending in the Circuit Court of the United States in and for the Northern District of New York. (See record, pp. 528 & 529.)

As the case stands now, therefore, the defendant, William Foster, Jr., or his grantees, are the owners of the railroad premises, holding under sales made under and in pursuance both of the decree and the judgment.

Having thus obtained unquestionable title to the premises in question, he is seeking in the Circuit Court of the united States for the Northern District of New York, through the same counsel who represents the defendants in error here, to escape the personal liability to pay the receiver's certificates which was adjudged against him in and by the decree of the Circuit Court of the United States. In that suit he relies upon the judgment now before this court for review as establishing his right to nullify the decree of the Federal Court.

Particulars in which the judgment of the Courts of the State of New York fails to give due effect to the decree of the U. S. Circuit Court.

1. The decree adjudges that the Central National Bank of Boston is the holder and owner of receiver's certificates amounting in the aggregate to $250,000 principal, upon which there is now due and unpaid to the complainant the said sum of $250,000 with interest from January 1, 1886.

The judgment authorizes the referee named therein to ascertain, determine and report from the evidence and findings *and such other evidence as shall be furnished him,* who are the holders of the said receiver's certificates, how much has been paid thereon, and directs him to give notice by advertising requiring the certificate holders to produce the same before him at his office, in Saratoga Springs,

or at such other place and at such other times as he shall designate, and make proof as to their title thereto and the amount due thereon. (See transcript of record, p. 115 print, 191, 192 original.)

The effect of this is to ignore the decree of the United States Circuit Court, which establishes the title of the Central National Bank of Boston to such certificates, amounting to $250,000 of principal.

2. The decree also refers it to a master *pro hac vice* to examine, ascertain and report who are the holders other than the complainant of said certificates, and how much remains due and unpaid thereon. (Transcript of record, p. 35.)

In pursuance of this decree, as was found by the court in the case at bar, all the defendant certificate holders appeared before the master *pro hac vice* mentioned in the decree and produced their certificates and made proof of their title thereto and the amount due thereon. (47th finding, p. 503; see also report of master *pro hac vice*, transcript of record, pp. 486-490, in which the ownership by the defendants certificate holders of their several certificates is found by the master.)

The judgment authorizes the referee named therein to re-try the issue as to who are the holders of the said certificates upon the evidence and findings given in the United States Circuit Court, *and such other evidence as shall be furnished him*, thus opening the whole question as to the title to the receiver's certificates.

3. The decree directs a sale of the premises or such part thereof as shall be sufficient to satisfy the amount due and unpaid on said certificates and the expenses of the sale and the costs of the suit, by Worthington Frothingham, Esq., who is named as referee for that purpose.

The judgment restrains the certificate holders and each of them, and their and each of their officers, agents, servants and attorneys from proceeding with any action or proceeding in any court whatever to enforce the lien of the certificates and *from suffering* any such action to be brought or *to be prosecuted or to be proceeded with.* (Transcript, p. 113 print, 188 original.) Also perpetually enjoins and restrains the defendants, the certificate holders, from proceeding with the sale under the decree, and *from suffering the said sale to proceed* in their or any of their names or behalf. (P. 113 print, 189 original.)

4. The decree declares the certificates to be a lien on the premises and property described in the complaint in the hands of the defendants, and requires the premises to be sold by the referee therein named and the referee to pay therefrom to the complainant or its solicitors the amount due to it on its certificates, and to the other certificate holders the amount of the principal and interest due thereon as the same may be found and reported by the master *pro hac vice.*

The judgment directs a sale by the referee named therein subject to a debt which the receiver in this case had been authorized to contract to the amount of $20,000, the proceeds of such sale to be paid to the holders of the Lebanon Springs bonds as established by the report of the referee, except as to the proportions coming to the owners of such bonds as were in the Sackett suit, as the same shall be found by such report as confirmed, he shall pay so much thereof to the certificate holders as shall satisfy the same as the same shall be found by said report so confirmed, and the balance to the holders of such bonds. (P. 114 print, 190 original.)

5. The judgment makes the decree absolutely ineffectual and useless to the complainants in that suit. It directly and in unambiguous language enjoins the certificate holders, for whose benefit the suit in which the decree was rendered was brought from availing themselves of that decree or deriving any benefit from it. It, by enjoining them from suffering a sale to take place under that decree, in effect commands them to prevent the decree of the United States Circuit Court from being carried out and executed.

6. The decree adjudges and decrees that the defendants, Rowland N. Hazard and William Foster, Jr., pay to the complainant and the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale

of said property and the application of the proceeds pursuant to the directions contained therein; adjudges and decrees that the complainant and the other of said certificate holders to be ascertained as aforesaid have execution therefor.

The judgment, by enjoining and forbidding the certificate holders, defendants in that action, not only from proceeding with the sale, but from suffering the sale to proceed in their or any of their names, prohibits the ascertaining of a deficiency and virtually annuls the decree that these defendants shall pay to the complainant and the other certificate holders, the residue of the indebtedness remaining unsatised after the sale of the property and from having execution therefor.

No case can be imagined in which a State court has made a more open and flagrant attempt to annul and hold for naught the decree of a Federal court, than is shown by a comparison of the decree of the Federal court with the subsequent judgment of the State court in this case.

POINTS OF PLAINTIFFS IN ERROR.

FIRST. THE COURT BELOW ERRED IN ATTEMPTING TO ENJOIN THE ENFORCEMENT OF A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES.

1. That such an attempt on the part of a State court is absolutely void and of no effect, is established by numerous dceisions of this court.

McKim v. Voorhis, 7 Cranch, 279.
Riggs v. Johnson County, 6 Wall. 166.
United States v. Council of Keokuk, 6 Wall. 514.
Mayor v. Lord, 9 Wall. 409.
Supervisors v. Durant, Id. 415.
Amy v. Supervisors, 11 Wall. 136.

See a fuller statement of these authorities in brief of plaintiffs in error in opposition to motion to dismiss or affirm, pp. 40 to 43.

2. Where jurisdiction has once been obtained by a Federal court over property, by being brought within its custody, it continues until the purpose of the seizure is accomplished and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in the State court.

Rio Grande R. Co. v. Gomila, 132 U. S. 478.
Central National Bank v. Hazard, 49 Fed. Rep. 293.

Moran v. Sturges, 154 U. S. 256, reversing Matter of Schuyler Steam Tow Boat Co., 136 N. Y. 169.

See these authorities more fully set forth in brief in opposition to motion to dismiss or affirm, beginning near bottom of page 43 to page 46.

3. The court below had no right to inquire into the merits of the case which was decided by the Circuit Court of the United States.

Cresent City Live Stock Co. v. Butcher's Slaughter House Co., 120 U S. 141, 157, 158.

Covell v. Heyman, 111 U. S. 176.

See extract from case in 120 U. S. on pages 46 and 47 of brief in opposition to motion to dismiss or affirm.

SECOND. THE INJUNCTION CONTAINED IN THE JUDGMENT AGAINST THE ENFORCEMENT OF THE DECREE OF THE U. S. CIRCUIT COURT CANNOT BE SUSTAINED UPON THE GROUND TAKEN BY THE COURT OF APPEALS IN ITS OPINION, THAT THE COURT HAD AUTHORITY TO CONTROL ALL PERSONS AND THINGS WITHIN ITS OWN TERRITORIAL LIMITS, AND THAT THEREFORE THE COURT MIGHT ACT IN PERSONAM UPON THE PARTIES BEFORE IT, AND DIRECT THEM BY INJUNCTION TO PROCEED NO FURTHER WITH THAT SUIT. (See opinion, pp. 535, 536.)

The rule thus invoked has no application whatever to this case.

Most, if not all, of the cases in this court above cited were cases where the State courts had attempted not directly to enjoin the Federal court but to enjoin the successful parties in the Federal court from availing themselves of their judgment or decree.

Thus in Riggs v. Johnson County, 6 Wall. 166, the injunction granted by the Iowa State court was against the county officers enjoining them from levying a tax to pay the judgment in the Federal court, and this was held to be beyond the powers of the State court.

In United States v. Council of Keokuk, 6 Wall. 514, the injunction by the State court was directed to the defendants, the Common Council of Keokuk, enjoining them from levying a tax to pay the judgment in the Federal court. This injunction was held to be inoperative.

In The Mayor v. Lord, 9 Wall. 409, the injunction of the State court was against the mayor and alderman of the city of Davenport to restrain the said officers from levying a tax to pay certain bonds of the city upon which a creditor had recovered judgment against the city in a Federal court.

In Supervisors v. Durant, 9 Wall. 415, the injunction of the State court was against the supervisors of a county to prevent their levying a tax to

pay interest on bonds on which the relator had obtained judgment in the United States court.

So in Amy v. Supervisors, 11 Wall. 136, the injunction of the State court was against the supervisors to restrain them from levying a tax to pay the judgment obtained in the Federal court.

Indeed, it is too plain to require argument, that an injunction granted by a State court, whether by order or judgment, which undertakes to restrain the successful parties in a suit in the Federal court, which has proceeded to judgment or decree, from availing themselves of the judgment or decree, is in substance and effect a reversal and annulment of the judgment or decree itself. Nobody can enforce such judgment or decree but the party to the suit or action, who has succeeded. If a State court can, by its order or judgment, prohibit him from enforcing the judgment or decree in his favor, it can virtually reverse and annul the judgment of the United States court.

It is to be observed, also, that the judgment now under review, not only enjoins the certificate holders from proceeding with the sale under the decree, but undertakes to restrain them "from *suffering said sale to proceed* in their or any of their names or behalf."

The statement, therefore, of the learned counsel for the plaintiffs, that "there is nothing in the judgment which interferes with the decree or the

process of the officers of the United States court," is incorrect. The defendant certificate holders are commanded *not to suffer* the sale to proceed. In other words, they are commanded to prevent the sale, which the United States Circuit Court has commanded the referee to make. By this judgment, the Supreme Court of the State of New York commands the certificate holder defendants to *prevent* the referee named in the United States Circuit Court decree, who is an officer of that court, from obeying the mandate of the Federal court, that he shall proceed to sell. How can it be said that this is not an interference with the decree or with any officer of the United States Court?

THIRD. THE JUDGMENT BELOW CANNOT BE SUSTAINED ON THE GROUND THAT COURTS WILL SET ASIDE AS A NULLITY A JUDGMENT, DECREE OR AWARD OBTAINED BY FRAUD. (See opinion of the Court of Appeals, transcript of record, p. 537 print, 852 original.)

1. There is no pretense, nor a particle of evidence anywhere in the record, that the decree in the United States Circuit Court, the enforcement of which is enjoined by this judgment, was obtained by fraud. There is no pretense, nor a particle of evidence that the certificates held by the defendants

were not obtained and purchased by them in good faith. On the other hand, the court below found as a fact that the defendant, The Central National Bank of Boston, became the purchaser for value of receiver's certificates to the amount of $250,000, which the said bank now holds and owns. (36th finding, record, p. 500.)

It also finds that since the rendering of the decree, the defendants, who are the plaintiffs in error here, have duly appeared before the master *pro hac vice* mentioned in the decree of the United States Circuit Court, and produced their certificates, and made proof of their title thereto and the amount due thereon. (47th finding, record, p. 503.)

The only fraud pretended or alleged consists in the application of part of the avails of the receiver's certificates to the payment of claims and judgments of certain bondholders against the Lebanon Springs Railroad Company, which are summarized on page 110 of the record, but this court has held that purchasers of receiver's certificates are not bound to see to the application of the proceeds, as appears by the following extract from the opinion of the court in the case of the Union Trust Company v. Illinois Midland Co., 117 U. S. 434:

A question was made before the commissioner that he receiver did not faithfully apply the money as directed by the court. He held, and the Circuit

Court sustained him, that these purchasers were not bound to see to the application of the proceeds, citing the decision to that effect by Mr. Justice Woods, in Stanton v. Alabama & Chattanooga Railroad Co., 2 Woods, 506. In this view we concur.

It was also contended before the commissioner, that all that the holders of these certificates were equitably entitled to was the money they paid, and without interest, and not the face of the certificates and interest. The view taken by the commissioner and confirmed by the Circuit Court, was that, as the certificates were issued for debts contracted by the court, when it had jurisdiction of the parties and of the subject matter, to persons who, in good faith, invested their money for the benefit of the property in the possession of the court, the certificates should be paid according to their tenor as authorized. We concur in these views. It may be added that, as the orer of June 29, 1881, authorized the certificates to be sold at not more than ten per cent. discount, it must be presumed that the parties taking the certificates relied on the promise to pay their face, and would not otherwise have trusted the receiver or the fund. The court which made that order thought the limit of discount a reasonable one, and the certificates were sold within that limit. (Pp. 461, 462.)

It was also held in the above case that it was no objection to the rule that certificates issued for necessary repairs must be allowed priority that the suit in which the first receiver was appointed, was not brought by the bondholders or their trustee. (See head-note, p. 435.)

In this case the order contained no limit of discount, but the verbal instructions of the judge to the receiver, were that the certificates were not to be sold at less than eighty cents (p. 395), and it appears that sales were actually made at ninety cents (p. 396), and that all the money realized by the receiver from the second issue of certificates, except such as was used in redeeming the first issue, was expended upon the railroad and in the purchase of rolling stock, except as appears otherwise from Mr. Cadman's report. (See Van Valkenburgh's testimony, pp. 395-397.)

See, also, Kneeland v. Luce, 141 U. S. 491, 509.

2. The complaint in this action does not allege any fraud in the bringing or the conduct of the suit in which the decree of the United States Circuit Court was rendered. It does not ask for any relief as against said decree. There is no allegation in the complaint that the defendant, The Central National Bank of Boston, and the other certificate holders did not purchase their certificates in good faith. There is an allegation that they obtained them in the first instance for much less than their face value, but the complaint adds "under what circumstances or agreements plaintiff does not know." The prayer for relief does not ask for any injunction against enforcing the decree of the United States

Circuit Court, or to set aside that decree, or in any way to interfere with it. It does ask that the certificates may be adjudged to have been beyond the power of the court to issue, and to be of no validity except to bind the interest represented by the eight bonds of Marvin Sackett, and the interest of the defendants in that action, and it asks generally for an injunction to prevent the defendants from interfering with any part of the railroad or property; but there is no intimation that there was to be any relief as against the decree, although the fact that such a decree had passed is alleged in the 28th subdivision of the complaint. (Printed p. 22; see prayer for relief, printed p. 23.)

No court has been more emphatic in enforcing the rule that a judgment will not be sustained which is not *secundum allegata et probata* than the Court of Appeals of the State of New York.

Southwick v. 1st Nat. Bk. of Memphis, 84 N. Y. 420.
Day v. New Lots, 107 N. Y. 148, 154.
Romeyn v. Sickles, 108 N. Y. 650, 652.
Terry v. Munger, 121 N. Y. 161, 171.

3. But the argument is that the Sackett suit, under the judgmen in which the sale of the premises to Foster and Hazard was made, was fraudulent, and that, therefore, the title to the premises obtained by that sale was bad, and that by reason of

such fraud the Supreme Court of the State of New York had jurisdiction to enjoin the enforcement of the decree of the Federal court. The following is the language of the Court of Appeals on this subject:

It was after the decree of the United States Circuit Court was rendered that the Supreme Court of New York, sitting as a court of equity, assumed jurisdiction of all the parties connected with this long and complicated contest, and undertook to adjust their rights and interests.

In so doing, it rendered its judgment reviewing and reversing the Sackett judgment, setting aside the sale and referee's deed to Hazard and Foster under it, and enjoining the certificate holders from proceeding with the sale under the United States Circuit Court decree.

It is thus apparent that if a court of equity, having jurisdiction of all the parties, was to give complete relief in dealing with the entire subject matter, it must restrain the certificate holders from proceeding with the sale under the decree of the United States Circuit Court, as the foundations of that suit had been utterly swept away by the judgment in the action at bar. (Record, p. 535.)

But the alleged fraud in the Sackett suit was a matter of public record existing long before the commencement of the suit of the Central National Bank against Hazard and Foster and others, in which the decree was rendered. This is apparent from an inspection of the record in this case. The

facts constituting the alleged fraud are grouped together in the findings of fact contained in the judgment, and appear on pages 107 to 110 of the record. It appears from these findings that the payments made which are alleged to be fraudulent, were made pursuant to orders or judgments of the court after an investigation of the various claims of the parties made by a referee appointed by the court. These payments are grouped together on page 110. They were made pursuant to orders and judgments obtained in 1881. These orders and judgments were made by the Supreme Court of the State of New York, were never questioned, excepted to or appealed from by any party. The evidence on which these findings were made is documentary and to be found, pages 216-229 of the printed record. The orders and judgments of the Supreme Court of the State of New York for the payment of the various sums paid are therein set forth and are matters of record on the files of the Supreme Court in the county of Rensselaer. The suit in which the decree of the United States Circuit Court was rendered was brought in 1886 (see pages 468, 469, of printed record), was at issue as to all parties in May, 1886, was removed into the Circuit Court of the United States by the defendants in the suit in September, 1886 (record, p. 485), and the decree therein was passed on the 24th day of March, 1887. (Record, p. 34.) If this documentary evidence,

consisting of public records accessible to all the parties in that suit, constituted any defence to the suit of the Central National Bank against Hazard and Foster and others, the defendants in that suit should have availed themselves of it. It was not for a State court to undertake to annul and reverse the decree of the Federal court on the pretense that by reason of certain matters long before of public record, which were accessible and available to the parties defending that suit, the foundations for the decree in that suit had been "swept away."

The decree of the United States Circuit Court estopped the parties thereto not only as to every material matter within the issue, but also as to those matters, although not expressly determined, which are comprehended and involved in the language expressly stated and decided, whether they were or were not actually litigated or considered. This is the rule established by repeated decisions of the highest courts of the State of New York, and controlling on the courts of that State.

See Pray v. Hagaman, 98 N. Y. 351.
Jordan v. Van Epps, 85 N. Y. 427.
Lorillard v. Clyde, 122 N. Y. 41, 47.
Reich v. Cochran, decided by the Court of Appeals December 1, 1896, appearing in the Combined Official Series of New York State Reports, No. 188, December 19, 1896, and to appear in 151 N.Y. 122.

4. Even if fraud in obtaining the decree of the United States Circuit Court had been alleged and proved, the State court had no jurisdiction to grant an injunction or in any way to set aside or annul or modify such decree.

Judgments and decrees of the Circuit Courts of the United States are considered by this court as if within the protection of section 1 of article IV of the Constitution, although that relates, in terms, only to the judicial proceedings of other States. This court has held repeatedly that it is the duty of the State courts to give full faith and credit to judgments of the United States Circuit Courts on matters within their jurisdiction. As was said by this court in the case of the Crescent Live Stock Co. v. Butchers' Union, decided in 1887, in speaking of Circuit Courts of the United States:

Their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves and may be carried into execution in due course of law to its full extent,

furnishing a complete protection to all who act in compliance with its mandate.

120 U. S. 157, 158.

This court had before laid down the rule that where a State court refuses to give effect to a judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is raised which may be brought to this court for revision; that the case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up; and further, that although the refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, namely, the first section of article IV, still that in either case, whether the validity or due effect of a judgment of the State court, or that of a judgment of the United States Court, is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court.

Dupasseur v. Rochereau, 21 Wall. 130, 134.

It has also been laid down by this court that "the judgments of the courts of the United States have invariably been recognized as upon the same footing so far as concerns the obligation created by

them, with domestic judgments of the States wherever rendered and whenever sought to be enforced."

Embry v. Palmer, 107 U. S. 3, 10.

It was held by this court in 1866, that in an action upon the judgment of a State court in another State, a plea of fraud in obtaining the judgment could not be admitted as an answer.

Christmas v. Russell, 5 Wall. 290, 304, 305.

In the case last cited, it is said that the established rule is that so long as the judgment (of a sister State) remains in force, it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process mesne or final, as the case may be, to execute the judgment. (P. 305.)

See, also, following the doctrine of Christmas v. Russell, the following cases:

Green v. Van Buskirk, 7 Wall. 139.
Crapo v. Kelly, 16 Wall. 610, 637, 642.
Maxwell v. Stewart, 22 Wall. 77, 81.
Colt v. Colt, 111 U. S. 566, 578.
Hawley v. Donoghue, 116 U. S. 1, 4, 7.
Huntington v. Attrill, 146 U. S. 658, 685, 686.
Laing v. Rigney, 160 U. S. 531.

In Simmons v. Saul, 138 U. S. 439, it was held

that the judgment of a parish court of Louisiana within the sphere of its jurisdiction was binding upon the courts of the several States and of the United States, and that a Circuit Court of the United States, acting as a court of equity, would not entertain jurisdiction to set aside the granting of letters by such parish court on the ground of alleged fraud. See particularly pp. 458, 459, 460.

And in Kent v. Lake Superior Canal Co., 144 U. S. 75, where a bill in equity was filed in a State court, alleging fraud in obtaining a decree in a Circuit Court of the United States, and asking to set aside the alleged fraudulent decree, it was held that if there was error in the decree or in the sale under it, the remedy of the plaintiff was in the court which rendered the decree and confirmed the sale. (P. 88.) And it was laid down that if the appellant's remedy grew out of fraud, the remedy ought to have been sought in the court which rendered the decree and confirmed the sale. (P. 91.)

The case last cited is, upon this question, analogous to the case at bar as considered by the Court of Appeals, but in its facts stronger for the plaintiff below. The plaintiff brought his suit in the Supreme Court of the State of New York, alleging fraud in the obtaining of the decree in the Circuit Court of the United States, and asking to set aside

the decree or for relief from it; but a demurrer to the plea was sustained upon the grounds already stated. In this case the alleged fraud was not committed by the plaintiff in error, or in the suit in which they obtained their decree, but by other parties in a previous suit, and was proved only by the production of matters of public record, accessible to the defendants in the suit in which the decree was rendered.

It is respectfully submitted that these cases conclusively show that the ground taken by the Court of Appeals, as stated in Judge Bartlett's opinion on page 537 of the printed record, is entirely unsound, and cannot be sustained by this court.

FOURTH. THE JUDGMENT AT BAR CANNOT BE SUSTAINED AS A DECREE FOUNDED UPON A BILL OF REVIEW, OR UPON ANY OF THE AUTHORITIES CITED BELOW BY THE DEFENDANTS IN ERROR.

1. As has already been shown, there is no pretence of any fraud or any error in the decree rendered by the United States Circuit Court. The only fraud alleged or claimed is in the Sackett suit, which preceded, and such fraud occurred years before the suit was brought in which the United States Circuit Court decree was rendered.

2. The rule is laid down in section 1582 of Story's Equity Jurisprudence, as follows:

The only question of fraud which is opened to examination in a court of equity, as a ground for enjoining the judgment of any court having jurisdiction of the case, whether domestic or foreign, is such as intervened in the proceedings by which the judgment was obtained. All questions prior to the proceedings by which the judgment was obtained, are necessarily concluded by it.

3. The two cases principally relied upon by the defendants in error below, were Campbell v. Railroad Co., 1 Woods, 368, and Marshall v. Holmes, 141 U. S. 589. But neither of these cases aid the defendants in error.

(a) In the Campell case, the bill was filed in the same court which rendered the decree complained of. The fraud was plainly proved, and the court in the exercise of a jurisdiction which no one could question, held that it could review and reverse its own decree upon a bill of review for fraud in the obtaining of the decree complained of. It will be seen that the suit has no analogy whatever to that in which the judgment now before this court for review was rendered.

(b) The case of Marshall v. Holmes was also entirely unlike that now before the court. Indeed, that case, if applicable at all, is an authority for the plaintiffs in error. All that was decided in that case, was that the case had been duly removed into

the United States Circuit Court, and that all proceedings in the State court after the filing of the proper petition and bond were void. In the course of the opinion, certain propositions were laid down which were doubtless correct, but which have no application whatever to the case now before the court, because, as has already been clearly shown, there was no pretence of any fraud in the suit in which the decree, the execution of which is enjoined, was rendered.

The subsequent case of Kent v. Lake Superior Canal Co., 144 U. S. 75, above referred to, shows that the remarks made in the case in 141 U. S. can have no such meaning as is given to them by the counsel for the defendants in error.

4. Upon well-settled principles the plaintiffs below in this suit could not have filed a bill to review the decree of the U. S. Circuit Court. They were not parties to that suit, which was between the certificate holders, as plaintiffs below, represented by the Central National Bank of Boston, and Foster and Hazard, the purchasers under the judgment in the Sackett suit, who had assumed the payment of the certificates, and their grantees. The defendants in that suit could not have filed a bill of review unless they had first performed the decree. They did, in fact, petition the Circuit Court for leave to file such a bill, but their prayer was denied. Although this fact does not appear in this record,

its truth will not be questioned. The fact of their having done so is, however, immaterial, as any application for a bill of review should have been made to the court in which the decree was rendered. The principles governing such a bill have recently been laid down by the Circuit Court of Appeals for the Fourth Circuit in Hoffman v. Knox, 50 Fed. Rep. 484, reversing Knox v. Iron Co., 42 Fed. Rep. 378.

FIFTH. NO FACT HAS OCCURRED SINCE THE RENDITION OF THE DECREE WHICH MAKES IT INEQUITABLE OR IMPROPER TO ENFORCE IT.

1. It is not questioned that there are cases where something has arisen since the rendition of a decree or judgment which renders its enforcement inequitable, or that in such cases the parties holding the judgment or decree of the Federal court or a sister State court, may by reason of such subsequent facts be enjoined from enforcing it. This would be the case where the judgment or decree in question had been reversed upon appeal or where it had been paid or collected, and the party was seeking unjustly to enforce it a second time.

So where two parties claim the same fund, and one of the claimants was not made a party to the

suit in which the judgment or decree in question was rendered, as in

Barry v. Brune, 71 N. Y. 262.

But in this case, neither the complaint nor the proofs nor the findings show any facts arising since the decree impairing the obligations of the defendants in that suit to comply with the decree.

We are aware that the Court of Appeals says in its opinion that "the setting aside of the judgment in the Sackett suit, upon which the suit in the United States Circuit Court was founded, for fraud, was a *new fact* occurring since the decree in that court which gave jurisdiction in this action to enjoin proceedings thereon." (Record, pp. 535 & 536.)

But the court overlooked the fact above pointed out, that the alleged fraud in the Sackett suit was proved only by facts which were matters of public record long before the suit was begun in which the decree in the United States Circuit Court was rendered.

The above quoted language of the Court of Appeals utterly confounds the distinction between matters of fact and matters of law. The facts relied upon to establish fraud in the Sackett suit all existed, as has been before pointed out, long before the bringing or trial of the case in which the decree was rendered in the United States Circuit Court. As is shown in our brief in opposition to the motion

to dismiss or affirm on pages 54 to 57, if the doctrine of the Court of Appeals as above quoted is sound, there can never be anything conclusive in a judgment in a court of independent jurisdiction. If the court of the other jurisdiction desires to reverse and nullify a judgment or decree of the court first having jurisdiction, all that it has to do is to render a judgment in favor of some third person not a party to the first suit, setting aside and "wiping out" the contract, judgment or other transaction, which was the foundation of the first suit, and it may then reverse and annul the judgment or decree of the other jurisdiction on the pretense of a new fact, which consists of a provision of the very judgment which sets aside the decree of the independent jurisdiction. In other words, by inserting in the judgment which prohibits the enforcement of a Federal court decree, a provision "wiping out" the contract or judgment upon which that decree was rendered, the State court acquires jurisdiction to deprive parties who have obtained the decree in the Federal court from which they have not appealed, but which stands unreversed, unpaid and unperformed, of the benefit of that decree, and is enabled to do by indirection what the repeated decisions of this court running over a period of nearly a century, have held that a State court cannot do!

It has been claimed that the certificates which were the foundation of the suit in which the United

States Circuit Court rendered its decree, were annulled and "wiped out" by the judgment at bar. This is a mistake. On the contrary, the General Term of the New York Supreme Court expressly held upon the first appeal that the certificates were good as to the bondholders who were actually represented in the Sackett suit, and were binding upon them.

57 Hun, at pages 514, 515.

It is said by the learned court that the decree or judgment in favor of the Central National Bank of Boston, referring to the decree in the United States Circuit Court, was good against the defendants in that action. (P. 514.) Also that on the new trial, there would need to be an identification of the bondholders who were entitled to come in and share with the plaintiffs in this action, and that they were those who held aloof from the Sackett. action. (P. 515.)

The findings of fact in this case show that nearly all of the bondholders were represented in the Sackett suit. The judgment recites a finding that the Sackett suit was commenced at the request and with the concurrence of bondholders amounting to about $1,200,000 at their face value, and that counsel retained and acting for bondholders amounting to about $1,200,000 drew the original complaint at the request and with the concurrence of said

bondholders, inciuding Sackett; that one Edward Crane was the owner of bonds amounting to $700,000 face value and was represented in the Sackett suit at its beginning, and that other persons who were named as the owners of bonds to a very large amount were associated with Sackett in that suit and represented by the attorney and counsel who conducted the suit. (See judgment reciting findings of fact on page 109 of the printed record.) There is no evidence that any of the plaintiffs below "held aloof" from the Sackett suit or were not represented therein. (43rd finding, p. 502 of record.)

It is expressly held in this very case by the courts below that the certificates were good as to the bondholders who were actually represented in the Sackett suit, and were binding upon them. There is nothing in the judgment at bar (striking out the portions of which we complain) which is inconsistent with the fact that Foster and Hazard acquired by the sale to them under the judgment in the Sackett suit, title to an undivided part of the premises in question, bearing the same proportion to the whole premises as the number of bondholders represented in the Sackett suit bore to the entire number of bondholders, and that the receiver's certificates were valid to the same extent.

As has already been shown in the brief filed in opposition to the motion to dismiss or affirm (sixth point, pp. 58-63), the court below entirely misap-

prehended the effect of the decision and decree of the United States Circuit Court. This court is again referred to the opinion of that court reported 30 Fed. Rep. 484, and especially to the portion thereof quoted on pages 58, 59 and 60 of the brief in opposition to the motion to dismiss or affirm.

The opinion of Judge Wallace, upon which the decree in question was passed, puts the right of the complainants in that suit to recover, upon the ground that the defendants were purchasers at the sale under the judgment in the Sackett suit, and it is said by Judge Wallace, "It is wholly immaterial to them whether the certificates were or were not negotiated upon fair terms and for the best interest of the fund." He says that the purchasers at the sale under the decree and every person claiming under them are estopped from contesting the validity of the certificates or from questioning the amount for which the certificates were declared to be a lien upon the property purchased; that the defendants are privies to that judgment and concluded by it equally with the original parties to the suit.

SIXTH. THE COURT BELOW ERRED IN AFFIRMING THE PROVISION IN THE JUDGMENT THAT THE REFEREE THEREIN NAMED SHOULD ASCERTAIN, DETERMINE AND REPORT FROM THE EVIDENCE AND FINDINGS, AND SUCH EVIDENCE AS MIGHT BE FURNISHED HIM,

WHO ARE THE HOLDERS OF THE RECEIVER'S CERTIFICATES, AND IN REQUIRING THE HOLDERS OF SAID CERTIFICATES, INCLUDING THE PLAINTIFFS IN ERROR, TO PRODUCE THEIR CERTIFICATES BEFORE THE REFEREE, AT HIS OFFICE IN SARATOGA SPRINGS, OR AT SUCH OTHER PLACE AND AT SUCH TIMES AS HE MIGHT DESIGNATE, AND MAKE PROOF AS TO THEIR TITLE THERETO. (See assignments of error 5 and 6, transcript of record, p. 545; see also judgment, record, p. 115; also exceptions 41st to 47th inclusive, record, p. 511; 12th proposed conclusion of law, p. 506; exception to refusal to find same, exception 23rd, p. 512.)

The title of the plaintiffs in error to the respective certificates held by them was conclusively established by the decree of the United States Circuit Court. Neither the Supreme Court of the State of New York, nor any referee appointed by its judgment, had any authority or jurisdiction to review or re-open the question as to the title to those certificates.

SEVENTH. THE COURT BELOW ERRED IN REFUSING TO FIND, AS REQUESTED BY THE PLAINTIFFS IN ERROR, THAT THE RECEIVER'S CERTIFICATES HELD BY THE CENTRAL NATIONAL BANK OF BOSTON, PETER BUTLER AS RECEIVER, THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

AND THE OTHER PERSONS WHO APPEARED BEFORE THE MASTER PRO HAC VICE AND PRODUCED THEIR CERTIFICATES, ARE, AS AGAINST ALL THE PARTIES TO THE ACTION, AND ALL THE HOLDERS OF THE SAID BONDS OF THE LEBANON SPRINGS RAILROAD COMPANY, INCLUDING THE PLAINTIFFS BELOW HEREIN, A FIRST LIEN UPON THE RAILROAD PREMISES DESCRIBED IN THE COMPLAINT, AS ADJUDGED BY THE CIRCUIT COURT OF THE UNITED STATES BY ITS DECREE. (See 7th assignment of error, record, pp. 545, 546 print; see also proposed conclusion of law 12th, and the exception to the refusal to find the same, pp. 506, 512.)

These exceptions raise the question as to how far the defendants in error, the plaintiffs below, were bound by the judgment in the Sackett suit, and by the deed therein to Foster and Hazard, the purchasers at the sale under the judgment in that suit, and the subsequent adjudication contained in the decree of the United States Circuit Court.

1. The suit of Sackett v. Root was a representative suit.

The plaintiff in that action represented not only himself, but all the other bondholders of the Lebanon Springs Railroad Company. There were two millions of dollars of these bonds in denominations of one thousand dollars each. The rights of these bondholders were all alike. This equality of

interest was recognized in the complaint in Sackett v. Root. No relief was therein prayed for, except on behalf of all the bondholders. (See complaint in Sackett suit, pp. 168 to 174 of record.) When the final judgment was rendered in that action, no relief was given to Sackett individually, but the relief was on behalf of all the bondholders alike. (See judgment, pp. 299 to 304.) It was in every sense a representative suit.

(1) The parties were evidently too numerous to be joined.

(2) They had a community of interest.

(3) The suit was for the benefit of all.

Kerr v. Blodgett, 48 N. Y. 62.

Thompson v. Brown, 4 Johns. Ch. 619, 638.

Wilder v. Keeler, 3 Paige, 164.

Brooks v. Gibbons, 4 Paige, 374.

Egberts v. Wood, 3 Paige, 517.

Travis v. Myers, 67 N. Y. 542.

Schuehle v. Reiman, 86 N. Y. 270, and see, especially, remarks of Danforth, J., on page 273.

In such cases where the complaint is so framed and the subsequent proceedings conform to the practice of the court, the other parties similarly situated to the plaintiff are bound by the proceed-

ings in the action, whether they come into the suit or not.

Kerr v. Blodgett, supra.
Schuehle v. Reiman, supra.

This principle has been frequently applied to the case of railroad bondholders.

Galveston R. R. Co. v. Cowdrey, 11 Wall. 459.
Ex parte Cutting, 94 U. S. 14.
Campbell v. R. R. Co., 1 Woods, 376.
Wilmer v. Atl. and R. A. L. Ry., 2 Woods, 450.

2. The representative character of the suit of Sackett v. Root, and the binding effect upon the other bondholders of the orders, proceedings and judgment therein, cannot successfully be denied on the ground that that suit was not fairly conducted or that Sackett's purpose was to use the suit fraudulently for his own profit.

(a) The allegation in the complaint in this suit in this respect is as follows:

That said suit, by said Sackett, was brought and conducted, not with the intention of realizing the said property for the benefit of the bondholders or any of them, or for himself, as a bondholder, but collusively and with the intent that he and others should receive large sums of money from the said

property under color of the payment of claims which, even if valid, were subordinate to said mortgages.

And with the intent that said railroad and property should be acquired by others free from the lien of said mortgages and without realizing anything to the holders of said bonds.

See complaint, par 26, p. 22 of record.

NOTE.—It would appear from the printed record as if this allegation was admitted by the answer of these defendants, because by the twelfth paragraph of our answer the allegations contained in the twenty-sixth paragraph of the complaint are admitted. But the allegations above quoted were not in the original complaint, but were added to paragraph twenty-six by amendment, as appears by the stipulation upon page 85, by which it is admitted that at the time of the service of the answer of the Central National Bank of Boston, the twenty-sixth paragraph of the complaint did not contain the allegations in regard to the intention of Sackett in bringing his suit, which are contained in the twenty-sixth paragraph of the third amended complaint, and is stipulated that the admission of the allegations contained in the twenty-sixth paragraph is to be considered as admitting only that portion of the twenty-sixth paragraph ending with the words, "allowances of the suit," and that the remaining part of said paragraph twenty-six shall be deemed as controverted under the second paragraph of the answer of the said defendant.

(b) There is nothing certainly in the complaint or in the judgment of the Sackett suit to sustain this claim on the part of the plaintiff. Plaintiff's counsel attempts to sustain it by referring to certain orders and proceedings in the Sackett suit. It is unnecessary to discuss the propriety of these orders and proceedings. They are not involved in this

action. It is enough to say that they were orders and proceedings of the court. The claims in question were heard before a respectable referee, the late Judge Strait, of Rensselaer county. The reports of the referee were confirmed by the Supreme Court. Nobody has, before this suit was brought, questioned these orders and proceedings. No appeal was ever taken from them or either of them. They are not open to review in this action.

(c) If this were a controversy between Marvin Sackett and the plaintiffs below, the case would be very different from the present one. The plaintiffs in error, whom we represent, appear here as holders of certificates issued by the order of the court, for which they paid value on the faith of the declaration contained in each certificate and in the order under which they were issued, that they should be a first lien upon the railroad and other property in the hands of the receiver. It would be monstrous to hold that their rights could be impaired if it could be proved that there were proceedings in that action, not connected with the issue of the certificates, of which they had no notice or knowledge, which were fraudulent or wrong. It is not claimed that there is any evidence whatever that any certificate holder was a party to any proceedings by which Marvin Sackett or anybody else improperly obtained any of the funds which were raised upon the certificates.

The order of the New York Supreme Court for the issuing of receiver's certificates was made after careful inquiry as to the condition and necessities of the road, made by an expert whose competency and integrity are unquestioned. (See recital in order, p. 31; order appointing expert, pp. 205, 206; report of expert. James H. Jones, pp. 210 to 212.) The plaintiffs in error on the faith of this order bought the certificates and advanced the money thereon without which the road could not have been kept running. Now the judgment of the courts of New York, if sustained, deprives them of the benefit of the order of the New York Supreme Court, under which they were issued, which provided that such certificates should be a first lien on the railroad premises (p. 32), and also of the benefit of the decree they obtained in the U. S. Circuit Court, because certain persons, without their knowledge, consent or connivance, are said to have improperly and fraudulently obtained some of the money which they paid for the certificates.

(d) The suit of Sackett v. Root was fairly conducted according to the practice of this court, within the meaning of the language used by the Court of Appeals in the case of Kerr v. Blodgett and Schuehle v. Reiman, above cited.

That suit was brought by Messrs. McClellan and Brown, as attorneys, and by Delos McCurdy, Esq.,

as counsel on behalf of parties representing more than a majority of the bonds. Edward Crane, who owned between $500,000 and $700,000 face value of the Lebanon Springs Railroad Company bonds, was consulted in regard to the Sackett suit, and was represented in that suit, as were numerous other persons owning bonds, aggregating nearly all of the issue of bonds. (P. 109 of record; see, also, 22nd and 27th findings made on request of plaintiffs in error, pp. 495, 496 & 497 of record.)

Application was made on behalf of some of the bondholders to be made parties to the suit. This application was denied. But the judge, in denying the motion of Bloodgood and others, used the following language:

"The plaintiff should not be embarrassed by having united with him on the record parties whose case he may not be able to sustain. At the same time, these parties who apply should have notice of every step in the case, so that they may protect their interests. An order may be made requiring all papers to be served on Mr. F. L. Westbrook, and allowing him as counsel to appear on trials, hearings and motions. T. R. W." (Twenty-third finding, p. 496.)

Thereupon an order was entered by the counsel for the applicants denying the motion to make the other bondholders parties, but providing that the plaintiff's attorneys should serve copies of all

papers and notices of every kind which should be served therein, upon Mr. F. L. Westbrook, "and he is hereby authorized and allowed to appear as counsel in behalf of the said bondholders upon all trials, hearings and motions herein." (See order, twenty-fourth finding, pp. 496, 497.) In pursuance of this order, all notices thereafter were served upon Mr. Westbrook, as attorney for the bondholders. (Twenty-sixth finding, p. 497.) And when the final decree was made, Mr. Hamilton Harris, at the request of Mr. Westbrook, and also at the request of other bondholders, appeared, and was recited as appearing for the bondholders other than the plaintiff (see recital in final judgment, at p. 300, reciting that the decree was made on hearing "Mr. Hamilton Harris, of counsel for the defendants, who have appeared in this action, and also of counsel for the bondholders of the Lebanon Springs Railroad Company, who have not been made parties to this action by name." (See, also, the testimony of Hamilton Harrs, p. 418.) F. L. Westbrook, Esq., the counsel named in this order, had appeared as counsel for the petitioning bondholders upon the motion. (Twenty-fifth finding, p. 497.) The order providing for notice upon him was entered by the attorney of record for the petitioning bondholders, was acquiesced in by them, was never appealed from or in any way questioned by any bondholder. (See the testimony of

Frederick L. Westbrook beginning at pp. 455 to 462.) It is submitted that by this order, acquiesced in by the bondholders, they became practically, although not by name, parties to the suit. Their counsel had notice of all proceedings (twenty-sixth finding), and by the order, had a right to appear. They had precisely the same standing in the suit that the Central National Bank obtained under its petition and the stipulation thereupon made, the substance of which appears on pages 444 & 445 of the record, under which its attorneys are recited in the judgment as appearing in the same manner that Mr. Harris appeared for the bondholders, and by which the bank was enabled to protect its interests and the interests of the other certificate holders in the judgment in the action.

It does not appear that any bondholder was excluded from taking part in the Sackett suit or from being heard therein. The relief which was given by the judgment was, as has already been stated, for the benefit of all the bondholders, without any partiality or preference. If, by certain interlocutory proceedings therein, some persons, including the plaintiff in that suit, were enabled to get an advantage, it is enough to say that such proceedings were not questioned by any bondholders, and that the certificate holders, who were as ignorant as possible in relation to such proceedings, are not responsible therefor. The principal parties

who received the moneys awarded by the judgment and order complained of, are not parties to this suit. (See their names on p. 110 of the record.) For anything that appears they were reponsible. If they obtained the moneys paid to them fraudulently or illegally, the remedy of the bondholders was by direct proceedings against these parties in that suit or otherwise.

(e) It was contended by the defendants in error below and virtually held by the courts of the State of New York, that if the orders and judgments in the Sackett suit were improperly granted, they are not binding upon the other bondholders, and that the plaintiffs below, although it is not proved that their bonds were not represented in the Sackett suit, are not bound by such orders or by the judgment in that suit. There are several answers to this contention.

(1) The court below had no power, collaterally, to assail or inquire into the proceedings and judgment in the Sackett suit. In the language of the N. Y. Commission of Appeals in Kerr v. Blodgett, "the judgment is conclusive against these plaintiffs, unless they were able to show some fraud or misconduct on the part of these defendants *in suffering the judgment.* It cannot be collaterally assailed or inquired into."

48 N. Y. at p. 69, Leonard, C.

(2) The meaning of the expressions used in some cases in regard to the suit being "fairly conducted," is that in a representative suit the proceedings, so far as they purport to be conducted in the interest of all those represented, are binding upon all the parties thus represented. In the language of the N. Y. Court of Appeals in a recent case: "Where the complaint is so framed and the subsequent proceedings conform to the practice of the court, such other parties, whether they come in or not, will be bound by the judgment or other act of the court."

Schuehle v. Reiman, 86 N. Y. 270, 273.

For instance, if the judgments or orders referred to by plaintiff's counsel, and found by the court below, which require the payment to Sackett of the sum of $796.80, to his attorneys $1,200, to Mr. Taylor of $2,500, and to Mr. Tilden of $23,967.37, were improper and unfair, it was entirely competent for the other bondholders, or any of them, to apply *in that suit* to vacate such orders and judgments, and in case such application had been denied, to appeal from the order of denial, and in that action to have judgment for restitution against any parties who had improperly obtained a part of the fund which should have been equally shared by bondholders. It is not necessary that a person interested should be a nominal party to the suit in order to have a right to be heard and to appeal

from such an order. This has been repeatedly held by the courts of New York.

Hobart v. Hobart, 23 Hun, 384.

In the Matter of Attorney-General v. N. A. Life Ins. Co., 77 N. Y. 297, 299, 300.

Lewis v. Jones, 50 Barb. 645, 673.

The decision of Judge Westbrook, and the order entered by the counsel for the bondholders, by which the counsel for the other bondholders was expressly "authorized and allowed to appear as counsel in behalf of said bondholders upon all trials, hearings and motions herein," show that the court intended that the rights of all bondholders should be protected in that action. This privilege, secured by that order, necessarily involved the right of review, by appeal or otherwise, in case any of such bondholders deemed themselves aggrieved by any order or judgment in that suit.

(3) No evidence whatever, outside the record, has been given to show any fraudulent intent on the part of Sackett. Upon the record, the New York Supreme Court has once adjudged that the receiver's certificates were legally issued, and were a first lien upon the road, and that the holders thereof were entitled to recover the full face value thereof, with interest. The Circuit Court of the United States has rendered a similar judgment.

The Supreme Court of New York, upon the same evidence which had been held by it and by the Circuit Court of the United States sufficient to entitle the certificate holders to a judgment for the payment of their certificates in full, with interest, has held in this action that the certificates are invalid as against the plaintiffs below, who were constructive parties to the Sackett suit, and under all the authorities bound by the adjudications therein.

3. The plaintiffs below are estopped by the judgments of New York Supreme Court in the Sackett suit, and the decree of the United States Circuit Court in the suit of the Central Bank v. Foster and Hazard and others, from denying the validity of the certificates.

(a) The judgment in the Sackett suit being binding upon all the holders of the Lebanon Springs Railroad bonds, the sale thereunder also bound all such bondholders; and Hazard and Foster, as the purchasers under such sale, acquired all the rights of such bondholders in and to the premises in question.

(b) Foster and Hazard, the purchasers, having questioned the rights of some of the certificate holders, an action was brought in the New York Supreme Court against said purchasers and their

grantees, by the Central National Bank of Boston, as the holder of said certificates to the amount of $250,000, par value, for itself and other certificate holders, and which action was removed by the defendants therein into the United States Circuit Court, was tried there and a decree rendered establishing the validity of the certificates as a first lien upon the premises.

This judgment was also binding upon the bondholders, the defendants in that judgment having acquired all their rights by the sale to Foster and Hazard under the judgment in the Sackett suit.

4. Irrespective of these judgments, the receiver's certificates were and are a first lien upon the premises in question.

(a) Plaintiffs' counsel claims that they are not such first lien, by reason (1) of the five million mortgage to Park and Duncan; (2) of the mortgages issued by the New York, Boston and Montreal Railway Company, amounting to a fabulous number of millions of dollars, which are termed by the counsel, "French mortgages."

(b) It is true that Park and Duncan were not parties to the Sackett suit, and, therefore, were not, except so far as they were bondholders, bound by the judgment therein. But they, or their repre-

sentatives, are parties to this suit, and it has been conclusively proved that the five million mortgage was entirely without consideration. This is demonstrated by the testimony of Mr. Duncan, and is found as a fact by the court. (50th finding, pp. 503, 504.) Hull and Lincoln were not necessary parties, because they had conveyed before the Sackett suit was brought. The New York, Boston and Montreal Railway Company was a defendant in the Sackett suit, and so was its receiver. Park and Duncan were not parties, but the so-called five million mortgage having been entirely without consideration, as to the bondholders, and all parties at that time interested in the railroad premises, was utterly void.

(c) But it seems that Park and Duncan, or the New York, Boston and Montreal Railway Company, negotiated the bonds of the railway company, secured by subsequent mortgages, in France to a large amount; counsel for defendants in error claims to the amount of eight millions of dollars, and that out of this, $807,077.05 was paid to Park and Dnncan upon the five million mortgage. Hence, by some curious logic, it is argued that the Park and Duncan mortgage became good for $4,192,-923.95.

But, assuming that the facts are as claimed by plaintiffs below, what is the result? The title of

the New York, Boston and Montreal Railway Company was subject to the payment of the five million dollar mortgage. Although this mortgage was void as to the bondholders, the railway company, upon well settled principles, having accepted the deed which was made subject thereto, could not be permitted to question it.

Freeman v. Auld, 44 N. Y. 50.
Frederick v. Brewster, 26 Hun, 236.
Horton v. Davis, 26 N. Y. 495.
Parkinson v. Sherman, 74 N. Y. 88.

The mortgages issued by the railway company, called by plaintiff's counsel the "French mortgages," were issued as second mortgages, and subject to the payment of the five million mortgage. The lien, if any, created by these mortgages, was subject to a prior lien of five millions of dollars.

As has been shown, neither Hull and Lincoln, nor the New York, Boston and Montreal Railway Company, had any title to the premises in question as against the bondholders. The railway company could, therefore, give no title better than it had, to the mortgagees. But the right which the French bondholders probably supposed they acquired, and which they did acquire as against the New York, Boston and Montreal Railway Company, was subject to a prior mortgage of $5,000,000. These premises, it must be remembered, at public sale,

have never brought to exceed about half a million of dollars. They were sold in 1873, the New York part by Mr. Fairchild, as referee, for $100,000, the Vermont part, under the decree in that State, for $50,000. In the Sackett suit they were sold at $155,000, subject to the payment of certificates, assumed by the purchasers, amounting to $350,000, making, in all, the consideration of that purchase $505,000. The value of a second mortgage upon these premises, subject to a prior mortgage of $5,000,000, is certainly not very apparent. The situation as to the certificate holders is this: The French bondholders have no lien or right whatever, except subject to the mortgage for $5,000,000 held by Park and Duncan. That mortgage, as against the Lebanon Springs bondholders, is void; or, what is the same thing, it belongs to them, or, in the language of counsel for defendants in error, is impressed with a trust in their favor, and they must be paid to the extent of the amount of their bonds before anything can be paid from the proceeds of any sale to the holders of bonds secured by the so-called "French mortgages." Now, the Lebanon Springs bondholders were the parties plaintiff in the Sackett suit. These certificates were issued for their benefit and in their behalf. They constitute a first lien upon the premises as against such bondholders. Inasmuch, therefore, as only the Lebanon Springs bondholders have any rights to the five

million mortgage, and as the certificate holders have a right prior to the Lebanon Springs bondholders, it follows that, as against the five million mortgage, as against the Lebanon Springs Railroad bondholders, as against the French bondholders, the certificate holders have a first lien— a lien which is behind nothing, and which should have been recognized and adjudged in this case.

(d) But the counsel for the plaintiffs below relied especially upon the New York case of Raht v. Attrill, 106 N. Y. 423, decided by the Court of Appeals in October, 1887; but that case related to certificates issued by the receiver of a hotel property, and the court recognized the difference between the two kinds of corporations, saying that in the cases decided by this court, the jurisdiction was largely based upon the public character of railroad corporations, the public interest in their continued and successful operation, and the peculiar character and terms of railroad mortgages, and upon other special grounds not applicable to ordinary private corporations. (P. 436.)

This court has repeatedly laid down the rule from which it has not varied, in regard to the priority of receiver's certificates.

A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish, if not cared for

and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice. Consent is desirable, but is seldom practicable, where the debts exceed the value of the property. Though prior notice to persons interested by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent.

Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 455, 456.

Sage v. Memphis, &c., R. Co., 125 U. S. 361.

See, also, Kneeland v. Luce, 141 U. S. 491, 509, in which the case of Union Trust Co. v. Illinois Midland Ry. is followed, and it is said that the certificate holders had a right to rely on the promise of the court as to their priority plainly apparent on their face. (P. 509.)

See, also, remarks of Fuller, C. J., in Finance Co. v. Charleston, &c., R. Co., 62 Fed. Rep. 205, 208.

(e) When the Sackett suit was brought, the premises in question had been abandoned. Neither the New York, Boston and Montreal Railway Company, nor its receiver, was in possession. (19th finding, p. 495.) The property and franchises of the road were in use and occupation of persons having no right or authority therein. The last two occupants were Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company, neither of which had, or claimed to have, any authority or right to use or occupy the said railroad or its property, or any part thereof, derived from any person or persons having a right to grant such authority. (See the eighteenth, nineteenth and twentieth findings of fact in the Sackett suit, which are binding upon the bondholders, p. 495, and see, also, the testimony of Trenor W. Park, at pp. 323 to 325.) It appears by Park's testimony that Root was put in possession

by Mr. Bloodgood, who was one of the bondholders. (P. 323.) In the language of Mr. Park, "he was not even a lessee, he had no title to it, no bonds in it, no stock in it, and no lease of it." (P. 325.)

Under these circumstances it is not surprising that the road was permitted to go to decay. The extent of this decay and of the depreciation of the road appears from the report of James H. Jones, the expert appointed by the court. (Pp. 210 to 212.) This being the condition of things, the doctrine laid down by this court in 117 U. S., above quoted, has special force. It was the duty of the court to make such repairs as were necessary to keep the road and its structures in a proper condition to serve the public. Its power to do this did not depend upon consent nor on prior notice.

At this period, plaintiffs below and their counsel were not heard of; neither the French bondholders nor their trustees were heard of; the Union Trust Company, the trustee of the Lebanon Springs bondholders, was not heard of. It evidently considered its duty as accomplished, and itself *functus officio*. Mr. Sackett, in behalf of the bondholders, for whose benefit the purchases by Duncan and Park were made, who were the parties beneficially interested in Hull and Lincoln's title, called the attention of the court to this condition of things, and upon being satisfied that the necessities of the case required it, the order for the issuance of

receiver's certificates was made. If there was ever a case where the exercise of the powers of a court of equity, as so often recognized by this court as well as by the New York Court of Appeals, was not only justified, but demanded, this was such a case. The certificates thus issued became a first lien upon the property in question, without reference to the parties to the action or to any question of notice or consent; at all events the circumstances of the case were, in the language of this court, in 117 U. S., above quoted, "judicially equivalent to prior notice."

5. The plaintiffs below have no interest whatever in the premises described in the complaint, and their complaint should, for that reason, have been dismissed upon the merits.

(a) It has already been shown that the proceedings and judgment in the Sackett suit bound all the holders of Lebanon Springs Railroad bonds. The sale under that judgment was also, of course, binding upon such bondholders. All their right, title and interest in the premises in question were sold and conveyed under the decree to Hazard and Foster, who thus became seized and possessed of all such right and interest. The judgment in the United States Circuit Court against Foster and Hazard, who represented the former interest of the

bondholders and their grantees, was also binding and conclusive upon the defendants in error, the plaintiffs below. The effect of the purchase by Foster and Hazard was to give to them a good and sufficient title to the premises described in the complaint, subject to the payment of the receiver's certificates as against all the parties to this action.

(b) The fact that one of the plaintiffs below, Stevens, held some Harlem Extension bonds, gives him no right to maintain this action.

These bonds are confessedly subsequent to, and subject to, the bonds of the Lebanon Springs Railroad Company, amounting to $2,000,000, secured by a first mortgage on the premises. These bonds were cut off by the judgment in the foreclosure suit of the Union Trust Company against the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company and others, a copy of which is set forth in the complaint, and may be found on pages 11 & 12.

This judgment contains the provision:

"It is further adjudged that the defendants, and all persons claiming under them, or any or either of them, after the filing of the aforesaid notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof." (P. 12.)

The trustee for the Harlem Extension bonds was

the Union Trust Company of New York, which was also the trustee for the Lebanon Springs Railroad bondholders. This judgment was followed by a sale, and a conveyance by the referee named therein, to James C. Hull. That conveyance was not void, but it was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them. (See 1st, 2nd, 3rd & 4th conclusions of law in the decision in the Sackett suit. (P. 298.)

The conveyance by the referee to Hull, in accordance with the directions of Duncan, merely vested the title in Hull, as trustee for the bondholders, in whom the beneficial interest still remains. (Id.)

These findings and the judgment rendered thereon in the Sackett suit are binding upon the holders of the Lebanon Springs Railroad Company's bonds, of one of whom Mr. Stevens claims to be the successor.

The plaintiff has no bonds which were acquired by him earlier than November, 1886. (P. 439.)

The Harlem Extension bonds are confessedly subject to and behind the bonds issued by the Lebanon Springs Railroad Company.

The receiver's certificates, as has already been shown, are a first lien against the holders of the Lebanon Springs bonds; in other words, have a priority over them.

And yet it was contended by the counsel for

plaintiffs below that the certificates are "certainly behind the Harlem Extension mortgage." He said that the Harlem Extension bondholders are in exactly the same position as if there had been no sale, since there is to be a re-sale, and to sustain this extraordinary position he cites Cheney v. Woodruff, 45 N. Y. 98, 101.

Looking at that case, it will be seen that all it decides is that the purchaser at a mortgage foreclosure sale is not entitled to the rent of the premises accruing between the time of the purchase and the time of the delivery of the deed to him. There was no question of a re-sale in that case, nor was there anything decided which can, by any possibility, be construed as sustaining the position that a second mortgage, after a sale of the premises under the first mortgage upon a decree in foreclosure, at which sale the premises bring only a small fraction of the amount of the first mortgage, is not only not foreclosed, but, by some extraordinary process of legerdemain, instead of remaining behind the first mortgage, is put in front of and before receiver's certificates, which are confessedly ahead of the first mortgage.

The good faith and equity of the plaintiff below, Stevens, are well illustrated by the facts that this claim is seriously made on his behalf as a Harlem Extension bondholder, though it is conceded he has no bonds which were acquired by him before

November, 1886; that the Lebanon Springs Railroad bonds were regarded as worthless before the commencement of the Sackett suit by as able a financier as Mr. Augustus Schell; that the said Harlem Extension bonds were acquired by plaintiff long after the issuing of $350,000 receiver's certificates, after the premises had been sold, first for $150,000, and afterwards for $500,000, and that there had been no sane man, with any knowledge of the circumstances, who had regarded the Harlem Extension bonds as, by any possibility, worth any sum whatever for, at least, twelve years before the "acquisition" of some of them by Stevens.

(c) Whether the title of Foster and Hazard and their grantees is subject to any equitable right of redemption in favor of the five million mortgage, or of the holders of the bonds subsequent thereto, negotiated in Europe, is a matter with which the plaintiffs below have no possible concern. They represent no bondholders, except the holders of the old Lebanon Springs bonds issued under the two million mortgage and of the foreclosed Harlem Extension bonds. They have no standing to assert any claims on behalf of the holders of the bonds of the New York, Boston and Montreal Railway Company, nor have they any standing in court to try to patch up the title of Foster and Hazard or the

New York, Rutland and Montreal Railway Company, or the holders of bonds issued by said last named company. These parties are represented in this suit, and they do not, in their answer, complain of the judgment in the Sackett suit or of the decree of the United States Circuit Court.

6. No question can be raised in this action as to the amount due on the receiver's certificates.

(a) Certainly the defendants in error can raise no such question, for, as has been already shown, they have no interest in the premises nor any standing in court to question the rights of the certificate holders.

(b) Foster and Hazard and their grantees cannot question such right, because it has been adjudged in the suit in the United States Circuit Court, to which they and their grantees were parties; nor do they, by their pleadings, attempt to do so in this action.

EIGHTH. THE COURT BELOW ERRED IN REFUSING TO FIND, AS REQUESTED BY THE PLAINTIFFS IN ERROR, THAT IF ANY SALE BE MADE UNDER THE JUDGMENT IN THIS ACTION, SUCH SALE SHOULD BE MADE SUBJECT TO THE RIGHTS OF THE CENTRAL NATIONAL BANK OF BOSTON AND THE OTHER CERTIFI-

CATE HOLDERS, PLAINTIFFS IN ERROR HERE, AND THAT SUCH CERTIFICATES SHOULD BE PAID TO SAID CERTIFICATE HOLDERS FIRST OUT OF THE PROCEEDS OF ANY SALE THAT MIGHT BE HAD THEREON. (See 8th assignment of error, p. 546; see also 15th proposed conclusion of law, p. 507; 31st exception, record, p. 513.)

If there was any defect in the title of Foster and Hazard by reason of defect of parties in the Sackett suit, plaintiffs in error were entirely willing that it should be corrected by a judgment in this action, and a sale under such judgment; but they insisted that such sale should be subject to their rights under the decree. There would have been no difficulty or embarrassment in such a direction. The sale under the judgment of the New York Supreme Court would have been in effect confirmatory of the title given by the sale in the Sackett suit, and the sale to be had under the decree of the United States Circuit Court. This was in substance what was actually done. Foster purchased at the sale under the decree and then again at the sale under the judgment. He held both titles and conveyed them by his deed to the Lebanon Springs Railroad. He thus took and conveyed perfect title to the premises which he and Hazard had bought at the sale under the judgment in the Sackett suit. If in consequence of the embarrassment and doubt

thrown upon his first title by the bringing of this suit, which was evidently, as has been shown in the brief filed in opposition to the motion to dismiss or affirm, been conducted solely for his benefit, he has succeeded in getting the confirmatory deeds at small cost and expense, this is certainly no reason why he should be excused or protected by the judgment at bar from paying the receiver's certificates which, by the terms of his purchase in the Sackett suit, he and Hazard agreed to pay, and which, by the decree of the United States Circuit Court, they were made personally liable to pay, provided the proceeds of the sale under the decree should be insufficient to pay them.

NINTH. NOTHING HAS OCCURRED SINCE THE JUDGMENT WHICH AFFECTS THE RIGHT OR INTEREST OF PLAINTIFFS IN ERROR IN OR TO A REVERSAL.

This is demonstrated in the Eighth Point of our brief in opposition to the motion to dismiss or affirm. (P. 65 et seq.)

Plaintiffs in error are still vitally interested in reversing those portions of the judgment which interfere with their rights under the decree.

The same counsel who here is maintaining that we have no interest in obtaining a reversal of the judgment so far as it affects our rights under the

decree, is pressing in the U. S. Circuit Court a suit based upon this judgment, to restrain the certificate holders from enforcing that decree by issuing execution against Foster and Hazard, and the Court of Appeals say that our sale was "without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment." (See brief in opposition to motion to dismiss, &c., p. 77.)

On the other hand, the plaintiffs below have nothing to lose by the reversal of the parts of the judgment of which we complain. Their title as well as ours was sold and conveyed to Foster, and by him to the L. S. Railroad. The only parties interested in maintaining the judgment in its present shape, are Foster and Hazard, who are liable for a deficiency under the decree, and who joined in opposing the plaintiffs below.

TENTH. The portions of the judgment referred to in the assignment of errors, namely, the part thereof perpetually enjoining and restraining the certificate holders from proceeding in any court whatever to enforce any lien upon or for the sale of the premises, and from suffering any such action or proceeding to be brought or prosecuted in their names; the portion thereof perpetually enjoining and restraining said certificate holders from pro-

ceeding with the sale under the decree, and from suffering said sale to proceed in their or any of their names or behalf; the portion thereof making the sale subject to a debt of $20,000 authorized in this action; the portion thereof authorizing the referee named therein to take evidence as to the ownership of the receiver's certificates and to determine from the evidence and findings and from such other evidence as might be furnished him, who are the holders of such certificates and all portions of the judgment which in any way interfere with or reverse or nullify or set aside in whole or in part, the decree of the United States Circuit court above referred to, should be reversed, and the cause remanded to the State court with directions to strike out such reversed portions of the judgment from the judgment, and to take such further proceedings in conformity with the rights of the plaintiffs in error as established by the decree of the United States Circuit Court, as may be just and proper. Costs should be awarded to the plaintiffs in error against those defendants in error who were plaintiffs below.

All of which is respectfully submitted.

Dated February 1, 1897.

MATTHEW HALE,
HENRY D. HYDE,
Attorneys and of Counsel for Plaintiffs in Error.

Brief of Hopkins & Sargent for P. C.

Filed October 7, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

CENTRAL NATIONAL BANK OF BOSTON ET AL.,
Plaintiffs in Error,
v.
AARON R. STEVENS ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR CENTRAL NATIONAL BANK.

W. S. B. HOPKINS,
WM. A. SARGENT,
for Central National Bank.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 38.

THE CENTRAL NATIONAL BANK OF BOSTON AND OTHERS (holders of certificates issued by JOHN W. VAN VALKENBURGH as Receiver of the Lebanon Springs Railroad Company), *Plaintiffs in Error*,

AGAINST

AARON R. STEVENS AND OTHERS, *Defendants in Error.*

BRIEF OF THE CENTRAL NATIONAL BANK, Plaintiff in Error.

Statement of the Case.

This case comes before this court on writ of error to the Court of Appeals of the state of New York, which rendered a judgment affirming a judgment rendered November 10, 1891, by the Supreme Court of the state of New York in favor of Aaron R. Stevens and others, plaintiffs below, defendants in error here, who were holders of bonds issued by the Lebanon Springs Railroad Company, dated July 1, 1867.

The plaintiffs in error were holders of receiver's certificates issued on the Lebanon Springs Railroad, dated

April 2, 1881, and the controversy here is between the plaintiffs in error claiming a lien upon the Lebanon Springs Railroad for the amount of said receiver's certificates under an order of the New York Supreme Court, and claiming a lien on said railroad for said amount, and the right to obtain judgment against Foster and Hazard, defendants in error herein, for any deficiency in said amount, under a decree of the Circuit Court of the United States for the Northern District of New York, dated March 24, 1887, on the one hand, and bondholders of the Lebanon Springs Railroad claiming a lien upon said railroad, on the other hand.

The judgment of the New York Supreme Court dated November 10, 1891, among other things enjoins the owners of the receiver's certificates, and, among others, the Central National Bank, from proceeding with the sale of the Lebanon Springs Railroad under the decree of the United States Circuit Court, and from suffering the sale to proceed, thereby preventing the rendering of any deficiency judgment in the United States court against said Foster and Hazard.

The Central National Bank claims that there is error in the state court judgment dated November 10, 1891, in that it enjoins the enforcement of the United States court decree dated March 24, 1887.

This action was originally brought in 1887, notice of pendency being filed October 10, 1887, by Aaron R. Stevens, but other parties were brought in with him as co-plaintiffs as owners of Lebanon Springs bonds dated July 1, 1867. (See Fifth Amended Complaint, Record, pp. 2, 87.)

The defendants were all parties in interest, including —

1. The Union Trust Company, the trustee under the bonds dated July 1, 1867.

2. The purchaser who bought at the foreclosure sale in 1872, and his clerk, the grantee at the foreclosure sale.

3. The New York, Boston & Montreal Railroad Company, its receiver, and the trustees of its mortgages.

4. The certificate holders (plaintiffs in error here).

5. Foster and Hazard, the purchasers at the sale in the Sackett suit, and the Lebanon Springs Railroad Company.

In the complaint are prayers (Record, p. 23) that the owners of all the bonds issued by the Lebanon Springs Railroad Company be adjudged to have a first lien on the railroad; that the judgments in the foreclosure suits (hereinafter referred to) be specifically enforced; for a sale; and that it be adjudged that the certificates issued by Receiver Van Valkenburgh were beyond the power of the court to issue, and are of no validity except to bind the interest represented by the bonds in the suit; and that all defendants be enjoined from interfering with the property; for a receiver, and for general relief.

The Central National Bank answered (Record, p. 24), setting up the United States Circuit Court decree (Record, schedule C, pp. 34–37).

Upon the first trial of this action in the state court, judgment was rendered dismissing it on its merits; on appeal that judgment was reversed by the general term and a new trial ordered.

See Opinion, *Stevens* v. *Central Nat. Bank*, 57 Hun, 498.

At the new trial the judgment of November 10, 1891,

was rendered, and affirmed upon appeal, and is now before this court for review.

The decree of the United States Circuit Court was rendered March 24, 1887, in a suit brought by the Central National Bank in behalf of the certificate holders to enforce payment of the certificates against Hazard and Foster, the purchasers at the sale in the Sackett suit, the New York, Rutland & Montreal Railway Company, their grantee, and the American Loan & Trust Company, mortgagee. This decree is fully set forth in the record at page 34. It decreed, —

1. That the receiver's certificates dated April 2, 1881, were a lien upon the railroad "in the hands of the defendants herein, and of any persons claiming through or under the defendants, Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property at a sale thereof made under and in pursuance of the judgment rendered in said action [Sackett suit] in said Supreme Court [of New York] on or about the 12th day of January, 1885."

2. That the Central National Bank of Boston held $250,000 in amount of said certificates, on which there was due said sum of $250,000, and interest at six per cent from January 1, 1886.

3. A reference to William Lansing, master, to report who other than the Central Bank were the holders of certificates.

4. A sale of the railroad by Frothingham, referee.

5. Made a decree over against Foster and Hazard for any deficiency between the proceeds of sale and the amount due on the receiver's certificates.

Under this decree, advertisement was made May 19, 1889, of a sale of the property. (Record, p. 462.)

The adjudicating part of the judgment of the state court dated November 10, 1891 (for copy see Record, p. 112), adjudged, among other things, —

1. That all owners of any of the certificates hereinbefore described as issued by the receiver Van Valkenburgh, and each of them, and their and each of their officers, agents, servants, and attorneys, are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them.

2. That the judgment in the Sackett suit (hereinafter described), and the sale and referee's deed to Foster and Hazard, be reviewed and reversed, vacated, and set aside.

3. That the Central Bank and other certificate holders, and each of them, and their and each of their officers, agents, servants, and attorneys, be perpetually enjoined from proceeding with the sale under the decree (of the United States Circuit Court dated March 24, 1887) in the Central Bank suit, and from suffering the said sale to proceed in their or any of their names or behalf.

4. That the judgment and decree of 1872 (hereinafter described) be now enforced.

5. That the road be sold by John L. Henning, referee.

6. That the referee, out of the proceeds of sale, pay to the holders of Lebanon Springs bonds the amount found

due thereon, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy them, and the balance to the holders of such bonds.

The following facts appear in the findings of fact (Record, pp. 88–110) :—

The Lebanon Springs Railroad Company was organized under the laws of New York in 1852, and became the owner of property described in the decision and judgment (pp. 88–92).

On July 1, 1867, it issued and sold its bonds to the amount of $2,000,000 (pp. 92, 295, 492).

To secure these bonds it executed and delivered to the Union Trust Company of New York its mortgage upon all its property (pp. 92, 492).

Default was made in the payment of interest upon these bonds, and by reason thereof the principal sum secured by the mortgage became due January 1, 1870. (Sixth finding, p. 492.)

In January, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington & Rutland Railroad Company, and one company was thereby formed under the name of the Harlem Extension Railroad Company (pp. 93, 94). This company also executed bonds to the amount of $4,000,000, of which only $1,500,000 were issued, secured by mortgage to the Union Trust Company on the same property (p. 94).

No interest was paid upon said bonds, either by the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company, after January 1, 1870. (Ninth finding, p. 493.)

The Union Trust Company commenced an action to foreclose said first mortgage February 22, 1872, in the Supreme Court of New York, making the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan, and James B. Hodgkins defendants, in which judgment of foreclosure and sale was duly rendered December 10, 1872 (see copy judgment, pp. 96–98), and under said judgment all the powers, rights, and franchises therein described were sold January 25, 1873, by Charles S. Fairchild, referee, to William Butler Duncan for the sum of $100,000. (Tenth finding, p. 493.)

On the same day, by direction of Duncan, the said premises were conveyed by said referee to James C. Hull, the clerk of Duncan, by deed duly recorded. (Eleventh finding, p. 493.) Defendant Hull paid no consideration for the conveyance to him (p. 503).

No part of said purchase price of $100,000 was ever paid by Duncan or Hull or any other person, except the plaintiff's taxable costs and the referee's fees on foreclosure, paid by some one. (Twelfth finding, p. 493.)

About the same time the Union Trust Company commenced an action in Vermont against the Harlem Extension Railroad Company and the Lebanon Springs Railroad Company to foreclose said mortgage, which proceeded to decree of sale December 6, 1872. (See decree, pp. 98–100.) Daniel McEowen was appointed special master to make such sale, and sold the property of said companies in Vermont to Trenor W. Park for the sum of $25,000, and, by direction of Park, executed and delivered a deed of said property to Charles G. Lincoln, which was duly recorded in Vermont. No part of said $25,000 was ever

paid by Park or Lincoln or any other person. (Thirteenth finding, pp. 493, 494.)

No consideration was paid by defendant Lincoln for said deed (p. 503), none of the bondholders of the Lebanon Springs Railroad Company, except, perhaps, Duncan and Park, had any knowledge or information of said conveyances to Hull and Lincoln, or of the non-compliance with the terms and conditions of the sale and the non-payment of the purchase money, or of any of the subsequent acts or transactions with respect to the property, until about the time of the commencement of an action in 1880 in the New York Supreme Court, in which Marvin Sackett was plaintiff, and Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston & Montreal Railway Company, and Daniel Butterfield as receiver of the last-named company, were defendants. (Fourteenth finding, p. 494.) This action will be hereafter called "the Sackett suit." January 28, 1873, Hull and Lincoln, without consideration, made a bond to Duncan and Park for $5,000,000, secured by mortgage on the property conveyed to Hull and Lincoln (pp. 503, 504).

January 30, 1873, Hull and his wife conveyed the premises conveyed to him by Fairchild, referee, to the New York, Boston & Montreal Railroad Company for the nominal consideration of five dollars, which deed was duly recorded. (Sixteenth finding, p. 494.)

Afterwards Lincoln conveyed the premises, rights, and franchises conveyed to him by the special master in Vermont to the same company for a like nominal consideration, and his deed was duly recorded in Vermont. (Seventeenth finding, pp. 494, 495.) Said conveyances by Hull and Lincoln were made subject to the Duncan and Park mortgage for $5,000,000.

Afterwards the New York, Boston & Montreal Railroad Company became utterly insolvent, and Daniel Butterfield was appointed by this court receiver. (Eighteenth finding, p. 495.)

Neither the New York, Boston & Montreal Railroad Company nor said Butterfield ever took possession or used or occupied the said Lebanon Springs Railroad or any of its franchises, or claimed any right thereto, and never paid any consideration for said pretended transfer, but abandoned the same, and, although said receiver was made a party defendant in the Sackett suit, he made no claim to any right or property therein, and judgment by default was entered against him. (Nineteenth finding, p. 495.)

From about the time of the insolvency and the appointment of a receiver of the New York, Boston & Montreal Railway Company, and after its abandonment by the said company and its receiver, down to the commencement of the Sackett suit, the said road, its property and franchises, had been used and occupied by persons having no right or authority so to do. The last two occupants were Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company, defendants in the Sackett suit. Neither of said last-named parties ever had or claimed to have any authority or right to use or occupy the said railroad or its property. (Twentieth finding, p. 495.)

The Sackett suit was commenced at the request and with the concurrence of holders of Lebanon Springs Railroad Company bonds, owning bonds amounting to about $1,200,000 at their face value, and counsel retained, acting for such bondholders to the amount of about $1,200,000, drew the original complaint in said action, at the request and with the concurrence of said bondholders, including Sackett. (Twenty-second finding, pp. 495, 496.)

In the Sackett suit, John W. Van Valkenburgh was, October 1, 1880, appointed receiver of the Lebanon Springs Railroad Company, and, in November, 1880, qualified as such. (Thirtieth finding, p. 498. See order appointing receiver, pp. 206–209; certificate of filing security, pp. 209, 210.)

Said Van Valkenburgh took possession of the property of the Lebanon Springs Railroad Company, and continued to operate said railroad as such receiver until the appointment of his successor. (Thirty-third finding, p. 499.)

Upon his appointment, the receiver found that there was no rolling stock or means of operating the road or making necessary repairs, and thereupon, to relieve the immediate pressing necessity, the court ordered the issue of $25,000 par value of receiver's certificates, and afterwards, upon the further representations of the receiver of the condition of the road and its wants, an engineer expert was appointed by the court to examine into the condition of the road. Upon that report being presented, it appearing that a larger sum of money was necessary to preserve and protect the property and keep it running, the court ordered the issue of $350,000 face value certificates, $25,000 to be used to repay the first $25,000, and the other $325,000 to be used for the necessary wants of the road and its preservation. The order so made was the same as Exhibit A annexed to the answer of the Central National Bank, and was dated April 2, 1881. (See order, pp. 31, 32; Thirty-fourth finding, pp. 499, 500.)

Certificates of indebtedness, amounting in the aggregate to $350,000, were issued and negotiated by the receiver pursuant to said order. These certificates were in the form of Exhibit B annexed to the answer of the Central National Bank. (See pp. 33, 34; Thirty-fifth finding, p. 500.)

The Central National Bank became the purchaser for value of said receiver's certificates to the amount of $250,000, which it still holds and owns. (Thirty-sixth finding, p. 500.)

After the trial in the Sackett suit the court filed its decision, dated December 13, 1884, by which it found substantially the facts stated in the findings found at the request of the plaintiffs in error, from the first to the nineteenth, inclusive, except the seventeenth finding of fact, and also found, as conclusion of law, that the purchase by Duncan was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them; that the conveyance by the referee to Hull, in accordance with the directions of Duncan, merely vested the title in Hull as trustee for the bondholders; that the conveyance by Hull and wife to the New York, Boston & Montreal Railway Company was wholly ineffectual to pass any title to said company, or to divest the bondholders of any title therein, and that the title to and beneficial interest in the railway company, its rights and franchises, continued to be, and still was, in the bondholders of the Lebanon Springs Railroad Company, and that the property and franchises and powers of said company as described in the mortgage to the Union Trust Company, and all of the right, title, and interest of all the parties to the action, be sold at public auction, and that all parties be barred and foreclosed of all right, title, and interest in said property; that a referee be appointed to make such sale, and that, in the decree or judgment to be entered in the action, such clause or clauses should be inserted therein as in the judgment of the court might be necessary to protect holders of receiver's certificates. Judgment in said action was rendered January 12, 1885, and filed in the Rensselaer county

clerk's office. A copy of the judgment is annexed to the answer of defendants, Royal E. Robbins and others, marked "Exhibit A," except that the judgment contained a full description of the mortgaged premises described in the complaint in this action. (See Exhibit A, pp. 51–53; Thirty-eighth finding, pp. 500, 501.)

Under the judgment in the Sackett suit, the railroad and property of the Lebanon Springs Railroad Company was sold, January 12, 1885, to defendants Foster and Hazard, for $155,000, which was paid by them, and the usual referee's deed of the said railroad and property was made and delivered to them, and they were put in possession of said railroad and property, and remained so in possession until they delivered possession of the same to defendant, the New York, Rutland & Montreal Railway Company, and, by orders of the court, said receivership was terminated and the receiver discharged. (See allegation in the complaint, par. 25, p. 21, admitted by the answer of plaintiffs in error, par. 12, p. 25.) (Record, pp. 21, 25.)

Out of the said sum of $155,000, the purchase price of said premises, paid by Hazard and Foster, the interest due and unpaid upon the receiver's certificates held by the Central National Bank, the Massachusetts Mutual Life Insurance Company, and the receiver of the property of the Pacific National Bank, was paid, and the balance of the purchase money was used and applied as directed by the judgment in the Sackett suit. (Forty-fifth finding, pp. 502, 503.)

When the principal of said certificates became due, April 1, 1886, it was not paid, and thereupon the defendant, the Central National Bank of Boston, brought an action in the New York Supreme Court in behalf of itself, as well as other holders of receiver's certificates similarly situ-

ated, against Hazard and Foster, the New York, Rutland & Montreal Railway Company, and the American Loan & Trust Company as defendants.

For complaint in that suit see Record, pp. 469–474. The complaint, among other things, set up the order dated April 2, 1881, in the Sackett suit made by the New York Supreme Court, authorizing the issue and negotiation of receiver's certificates to the amount of $350,000, making the same a first lien on the road, and providing that, in case said railroad property at any sale thereof should not bring enough to pay the receiver's certificates in full, the purchaser should assume as a first lien thereon the balance of said principal and interest of said receiver's certificates; that the certificates were issued and negotiated; that a judgment was rendered January 12, 1885, by which it was adjudged, among other things, that said certificates were ratified and confirmed, and declared to be a first lien on the road, and providing for a sale of the road subject to the payment of the undue principal and interest of said receiver's certificates, and that the purchaser should take said property subject to the receiver's certificates, and should assume, as part of the consideration of the purchase, the payment thereof; that the referee, on June 12, 1885, sold the premises to defendants William Foster, Jr., and Rowland N. Hazard, and that Foster, acting for himself and Hazard, and the referee, signed a contract of sale whereby, among other things, Foster, acting for himself and Hazard, assumed and agreed to pay the unpaid principal and interest of said receiver's certificates as part of the consideration for such purchase; that the principal of the receiver's certificates became due April 2, 1886, and certificates held by the plaintiff to the amount of $250,000 were duly presented for payment, and payment refused; that the defendants, or some of them,

were in possession of the railroad property, describing it, and that they had some claim thereon subsequent to the lien of the certificates.

The complaint prays that the certificates be adjudged a lien on the premises, asks for a foreclosure, a receiver, and sale, and for payment of the certificates out of the proceeds of sale, and that defendants Hazard and Foster may be adjudged to pay any deficiency after applying the proceeds of sale to the payment of principal and interest of said certificates.

The defendants all answered. After issue was joined, the action was removed by the defendants therein into the Circuit Court of the United States for the Northern District of New York. After such removal, testimony was taken in behalf of all parties, and the suit finally brought to a hearing, and a decision and decree made therein, of which a copy is annexed to the answer of the defendant the Central National Bank, marked C. (See pp. 34–37.) In pursuance of said decree of the United States Circuit Court, the referee named therein, on May 19, 1889, advertised the property for sale, being the same premises described in the complaint in this action. (Forty-sixth finding, p. 503; Record, p. 462.)

Since the rendering of said decree in the United States Circuit Court, the defendants, certificate holders (plaintiffs in error) have duly appeared before the master *pro hac vice*, appointed by the decree, produced their certificates, and made proof of their title thereto and the amount due thereon. (Forty-seventh finding, p. 503.)

It appears by the record that a motion was made in the Court of Appeals, stipulated to be heard with the appeal, on behalf of the plaintiffs, and of Edward Winslow Paige as attorney for the Lebanon Springs Railroad Company,

for the dismissal of the appeal and the affirmance of the judgment (p. 519), such motion being based upon a resolution purporting to be passed by the directors of the Lebanon Springs Railroad Company, and upon a deed dated April 25, 1892, to William Foster, Jr., executed by the referee mentioned in the decree in the United States Circuit Court suit, and upon other deeds. (Record, pp. 520–527.)

Upon this motion an affidavit was filed by Alpheus T. Bulkeley, an attorney for the Central National Bank, alleging that, after the judgment of November 10, 1891, defendant Foster brought an action in the New York Supreme Court against the Central Bank and others, based upon the judgment of November 10, 1891, to set aside that portion of the United States court decree of March 24, 1887, adjudging that Foster, either alone or with Hazard, pay the Central Bank and other certificate holders the deficiency that might exist in the payment of the certificates after the application of the proceeds of the sale of the road, and to annul and enjoin the decree that execution issue for such deficiency; that Judge PUTNAM granted a temporary injunction; that said suit was then removed to the United States Circuit Court by the Central Bank, and the Circuit Court vacated Judge PUTNAM's injunction, and said suit is now pending; that the Central Bank set up as a defence the United States court decree of March 24, 1887; that Foster's counsel claims that the sale made by the United States court March 23, 1892, is void as made in violation of the state court judgment of November 10, 1891, and that the Central Bank had no right to take out execution, said right depending upon a legal and valid sale. (Record, pp. 528, 530.)

It does not appear that this motion was ever decided by the Court of Appeals.

When the state court judgment dated November 10, 1891, was rendered, the referee appointed by the decree of the Circuit Court of the United States was still advertising the premises for sale under that decree. Application was made on behalf of Peter Butler as receiver of the Pacific National Bank, the holder of some receiver's certificates, to the Circuit Court of the United States for an order requiring the said referee to proceed with the sale notwithstanding the injunction contained in the judgment of the New York Supreme Court. This motion was granted by Judge WALLACE.

See Opinion, 49 Fed. Rep. 293.

Afterwards the premises were sold, March 23, 1892, by the referee appointed by the United States Circuit Court decree, and deeded to William Foster, Jr., for $7500. (See deed, pp. 525–527.)

Foster also purchased under the judgment of the New York Supreme Court in this action, and received a deed dated May 16, 1892 (p. 524).

It appears from the findings of fact (Record, p. 110) that the court found that the suit of *Sackett* v. *Root* was neither brought nor conducted for the purpose of realizing the property to the owners of said Lebanon Springs bonds, and that it was brought and conducted for the purpose of realizing out of the property certain individual claims of said Sackett and Tilden in preference of and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property, and were behind the mortgage.

The Court of Appeals bases its affirmance of the judgment of November 10, 1891, on two grounds:

1. That the Sackett suit was not a representative suit, for lack of parties, the trustee under the mortgage not having been joined.

2. On the ground of fraud in that certain individual claims of Sackett and one Tilden were paid out of the proceeds of the receiver's certificates. (See Opinion, Record, p. 537.)

Assignment of Errors.

The following are the errors assigned by the plaintiffs in error which will be insisted upon in this argument: —

1. That the court below erred in that it did not give due validity and effect to the said decree of the Circuit Court of the United States in and for the Northern District of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated, was complainant, and Rowland N. Hazard, William Foster, Jr., the New York, Rutland & Montreal Railway Company, and the American Loan & Trust Company of New York, were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said court also erred in perpetually enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the Circuit Court of the United States above referred to.

3. That the said court also erred in enjoining and restraining all owners of any of the certificates described in said judgment as issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants, and attorneys, from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises, and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them.

4. The said court also erred in requiring the referee named in the said judgment to ascertain and report from the evidence taken upon the trial in said action, and the findings of the court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said court also erred in providing in the said judgment that the said referee therein named, ascertain, determine, and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained, and determined by the said

Circuit Court of the United States in and under the decree of the said Circuit Court of the United States above referred to.

6. The court below also erred in that by its judgment it required the holders of the said certificates, including the plaintiffs in error, to produce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon; whereas the said facts as to the title to said certificates and as to the amount due thereon had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States above referred to.

7. The court below also erred in refusing to find, as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Valkenburgh as receiver, and held by the defendants the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, and the other persons who have appeared before the master *pro hac vice*, and produced their certificates, are, as against all the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint, as adjudged by the Circuit Court of the United States by its decree in the suit of Central National Bank of Boston *v.* Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the master *pro*

hac vice named in said decree, and as reported by said master.

8. The court also erred in refusing to find, as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action, such sale should be subject to the rights of the defendant, the Central National Bank of Boston, and the other defendants, holders of receiver's certificates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein.

And that the said Court of Appeals should have reversed so much of the judgment of the Supreme Court of the state of New York as in any way impairs the rights of the plaintiffs in error or any or either of them under the said decree of the said Circuit Court of the United States, or in any way enjoins, restrains, or prevents the plaintiffs in error, or any or either of them, from enforcing the said decree of the said Circuit Court of the United States, or from having and enjoying the full benefit thereof; but that the said Court of Appeals in fact decided the contrary to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the Supreme Court of the state of New York. (See Assignment of Errors, Record, pp. 543–546.)

Brief of Argument in behalf of Central National Bank, Plaintiff in Error.

I.

This case presents federal questions.

The assignments of error clearly present federal questions in that the state court did not give due validity and effect to the United States court decree dated March 24, 1887, in that the state court perpetually enjoined the plaintiffs in error from proceeding with the sale under said decree, and in that the state court enjoined the certificate owners from proceeding with any action to enforce any lien upon, or the sale of, the property in question, and from suffering any such action or proceeding to be prosecuted or proceeded with in the names of any of them, thereby preventing the rendering of a deficiency judgment against Foster and Hazard in the United States Circuit Court under said decree.

I. The decision of the state court refuses to give due effect to a judgment or decree of a United States court.

This is a federal question within the jurisdiction of the United States Supreme Court on a writ of error to the highest court of the state. (*Crescent Live Stock Co.* v. *Butchers' Union*, 120 U.S. 141.)

As was said by Mr. Justice BRADLEY, in delivering the opinion of this Court, —

> "Where a state court refuses to give effect to the judgment of a court of the United States, rendered

upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the Constitution; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the state courts. (*Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Embry* v. *Palmer*, 107 U.S. 3; *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U.S. 141.)"

2. In this case the JUDGMENT of the state court as rendered, directly and expressly attempts to nullify a DECREE of the United States Circuit Court.

(1) The DECREE of the United States Circuit Court declares the receiver's certificates to be a lien upon the premises and property described in the complaint in the hands of the defendants in that suit or of any persons claiming under them. The JUDGMENT in this suit attempts to defeat the said lien and subordinate it to the rights of others.

(2) The referee named in said DECREE of the Circuit Court is directed to give public notice of sale and to sell the premises described in the decree, which are the same

as the premises described in the complaint in this action. The JUDGMENT in this case perpetually enjoins the certificate holders from proceeding with the sale, and "from suffering said sale to proceed in their or any of their names or behalf."

(3) The DECREE in the Circuit Court provides that, in case of any deficiency, the defendants Hazard and Foster shall pay to the complainant and the other certificate holders the residue of the indebtedness on said certificates remaining unsatisfied *after the sale* of said property. The JUDGMENT in this case deprives us of the benefit of that part of the decree by perpetually enjoining a sale, and thus defeating the personal decree against Foster and Hazard.

(4) The United States Circuit Court DECREE, as against all the parties to that suit, takes possession of the property and premises described therein for the purposes of such decree. They were until the sale under said decree, as against those parties and for the purpose of that suit, in the possession and under the control of the United States Circuit Court. This possession is good as against the world. It is a complete defence to any claim made in a state court to the property in question. (*Covell* v. *Heyman*, 111 U.S. 176, and cases cited; *Rio Grande Railroad Company* v. *Gomila*, 132 U.S. 478; *Central National Bank* v. *Hazard*, 49 Fed. Rep. 293; Opinion of WALLACE, J., Motion Papers, p. 74.)

(5) The DECREE in the United States Circuit Court adjudges that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates amounting in the aggregate to $250,000 of principal thereof, and adjudges the amount due and unpaid thereon. It also provides for proof by the other certificate

holders of their certificates, and the amount due thereon before a master *pro hac vice* named in said decree. (Record, p. 35.)

The JUDGMENT of the New York Supreme Court now brought before this court requires the referee named therein to ascertain, determine, and report from the aforesaid evidence and findings, and such evidence as shall be furnished him, who are the holders of the said certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon said certificates, and directs him to give notice by advertising in two newspapers published in the state of New York, to the holders of certificates, to produce the same before him, and make proof as to their title thereto and the amount due thereon. (Record, p. 115.)

The referee named by the state court is thus authorized upon the evidence and findings in the Sackett suit, "and such other evidence as shall be furnished him," to determine who are the holders of the receiver's certificates and how much is due thereon. No force or effect is given to the decree of the United States Circuit Court. The whole matter is opened and subjected to the determination of the referee appointed by the state court, as if there had never been any determination of the matter in the federal court. (See Assignments of Error 5, 6, Record, p. 545.)

3. The federal questions involved in this case are not settled by the sale under the United States court decree of March 24, 1887, as claimed.

It is true that a sale of the railroad has been made under the United States court decree of March 24, 1897, not-

withstanding the injunction contained in the judgment of November 10, 1891, and that defendant Foster bought the property for $7500 and received a referee's deed therefor. (See deed, Record, pp. 525–527.)

I.

But the sale under the United States court decree has not settled the questions here involved, and the plaintiffs in error are still vitally interested in these questions.

(*a*) The United States court ordered the sale to be made, thus declaring it to be valid.

> WALLACE, J., in *Central Nat. Bank* v. *Stevens*, 49 Fed. Rep. 293.

(*b*) The state court, however, holds that the sale is without force and effect, being in violation of the injunction.

The Court of Appeals say in their opinion in reference to this sale, —

> "The sale under the decree of the United States court was without force and effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar." (Record, p. 535.)

In other words, the state court enjoined the enforcement of the United States court decree, and now a certain action having been taken under the decree which they enjoined, the state court holds this action is without force and effect.

(*c*) The condition of the certificate holders under the decree and the judgment is not changed, therefore, by the

sale, one court holding the sale is good, and the other holding it is without effect.

(*d*) The state court judgment of November 10, 1891, by practically reversing the United States Circuit Court decree of March 24, 1887, irreparably injures the certificate holders.

The gist of the decree of March 24, 1887, lies in the provisions of the decree making defendants Foster and Hazard personally liable for such deficiency in case of any deficiency between the amount realized from the sale of the railroad and the amount of the principal and interest of the receiver's certificates.

Decree, Record, p. 34.

Of course it will appear by a bare inspection of the decree that the right of the complainant to a personal judgment against Hazard and Foster depends upon a valid sale of the premises under that decree, and a deficiency, after the application of the proceeds of sale, to the payment of the certificates.

The judgment of November 10, 1891, of the court in this action, if valid, absolutely deprives the complainant in that suit and the other certificate holders of their right, adjudged by the Circuit Court of the United States, to compel Hazard and Foster to pay this deficiency.

It virtually deprives the certificate holders of the benefit of that decree, and this at the suit of outside parties, who claim not to have been affected in any respect by the decree in the United States Circuit Court.

This judgment attempts to, and, if valid, does practically, so far as any benefit to the parties to the suit in the

United States Circuit Court is concerned, annul and reverse the decree of that court.

(*e*) **Unless the state court judgment of November 10, 1891, is reversed by this court, and the United States court decree of March 24, 1887, sustained, the certificate holders will be further exposed to endless litigation.**

In order to conclusively settle this litigation, which has been pending in various forms, so far as the certificate holders are concerned, for some twelve years or more, the certificate holders have taken the first opportunity of bringing the matter before this court.

The necessity of obtaining a conclusive adjudication by this court of the rights of the certificate holders is shown particularly by the following considerations: —

1. The certificate holders are liable to contempt proceedings before the state court if they try to enforce their rights for deficiency against Foster and Hazard.

That this is no idle fear is shown in that contempt proceedings were instituted in the state court against the certificate holders for suffering the United States court to make the sale under its own decree of March 24, 1887.

These were dismissed because Peter Butler had escaped the jurisdiction of the state court by dying, and the other certificate holders were not shown to have taken any action in the matter.

The Central Bank cannot escape by death, and, if it makes any move under the United States court decree, is liable to contempt proceedings in the state court.

2. Foster has already brought suit in the state

court, based upon the state court judgment of November 10, 1891, to enjoin further proceedings under the United States court decree of March 24, 1887, and to have the same annulled.

It is of the utmost importance, therefore, to the certificate holders that the judgment of November 10, 1891, be reversed and this litigation quieted.

On the other hand, the plaintiffs below have nothing to lose by the reversal of the parts of the judgment of which we complain. Their title as well as ours was sold and conveyed to Foster, and by him to the Lebanon Springs Railroad Company. The only parties interested in maintaining the judgment in its present shape are Foster and Hazard, who are liable for a deficiency under the decree, and who joined in opposing the plaintiffs below.

II.

The New York Supreme Court had no power to enjoin the enforcement of a decree of the United States Circuit Court by judgment or otherwise.

Its judgment, so far as it attempted to enjoin the enforcement of the decree in the United States Circuit Court, is absolutely void and of no effect. The authorities under this head are abundant.

In *McKim* v. *Voorhis*, 7 Cranch, 279, decided in 1812, McKim, a citizen of Maryland, had recovered a judgment in ejectment against Voorhis, a citizen of Kentucky, in the Circuit Court of the United States. Voorhis filed a bill in the Kentucky state court, and obtained an injunction staying all further proceedings on the judgment. The Supreme Court of the United States held that the state

court had no jurisdiction to enjoin a judgment of the Circuit Court of the United States.

In *Riggs* v. *Johnson County*, 6 Wall. 166, the plaintiff had obtained a judgment in the United States Circuit Court for the District of Iowa, and issued execution, which was returned unsatisfied. After the return of the execution, an Iowa state court granted an injunction perpetually enjoining the county officers from levying a tax to pay the judgment. Notwithstanding this injunction, the plaintiff applied to the United States Circuit Court for a mandamus to the county commissioners to compel them to levy a tax sufficient to pay the judgment. The commissioners answered, making as a return the injunction previously laid on them by the state court. The plaintiff demurred to the answer, assigning four causes of demurrer, the substance of the one chiefly relied on being that, after the judgment was rendered in the Circuit Court, the state court had no jurisdiction, power, or authority to prevent him from using the process of this court by mandamus to collect his judgment. The Circuit Court overruled the demurrer, and a judgment was given for the commissioners; but this court on error held that the demurrer should have been sustained, and that the state court had no jurisdiction to grant the injunction. The subject was very fully discussed by Mr. Justice CLIFFORD, who wrote the opinion in the case. It is stated by him that "if the power is conferred to render the judgment or enter the decree, it also includes the power to issue the proper process to enforce such judgment or decree" (p. 187).

It is expressly determined "that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied" (p. 187).

"Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution" (p. 187).

Again, it is held in the same case, —

> "Authority of the circuit courts to issue process of any kind which is necessary to exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the state courts or by any act of a state legislature" (p. 194).

Again, it is said, —

> "State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the circuit courts.
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> "Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action circuit courts are wholly independent of the state tribunals (pp. 195, 196).

"This principle has ever since been maintained in this court. *United States* v. *Council of Keokuk*, 6 Wall. 514; *Mayor* v. *Lord*, 9 Wall. 409; *Supervisors* v. *Durant*, 9 Wall. 415; *Amy* v. *Supervisors*, 11 Wall. 136.

In the case of *Mayor* v. *Lord*, *supra*, it is said by Mr. Justice SWAYNE, —

"It is not competent for a state tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts, and has heretofore been applied by this tribunal, upon the fullest consideration in other cases presenting the same question" (p. 414).

In *Amy* v. *Supervisors*, *supra*, Mr. Justice SWAYNE says, —

"The two sets of tribunals — state and national — are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees." (11 Wall. 138.)

In *Rio Grande R.R. Co.* v. *Gomila*, 132 U.S. 478, it is said that —

"the jurisdiction of a court of the United States once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in a state court" (p. 481).

This question has been decided in accordance with the contention of the plaintiffs in error by the Circuit Court of the United States for the Northern District of New York, with reference to the injunction granted by the judgment in this very action.

See *Central Nat. Bank* v. *Hazard*, 49 Fed. Rep. 293, in which Judge WALLACE, in his opinion, uses the following language: —

> "No federal court has ever recognized the authority of a state court to enjoin its proceedings or to enjoin parties from proceeding in a suit in which the federal court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the federal courts." (Citing the cases above referred to.) (P. 295.)
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> . . . . . .
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> "In the present case, after the decree was made by this court ordering the property to be sold by its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in the Sackett suit, and the property had been conveyed to Hazard and Foster, the property passed from the dominion which the state court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett suit. As was said in *Barrow* v. *Hunton*, 99 U.S. 80, —

"'If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; . . . a new case arising upon new facts, although having relation to the validity of an actual judgment or decree.'

"The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody, continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently commenced in a state court. (*Railroad Co.* v. *Gomila*, 132 U.S. 478.) (P. 296.) (See Motion Papers, pp. 77–79, fols. 278–284.)"

These decisions of this court that an interference by injunction by the state courts with proceedings in the courts of the United States will not be tolerated, have recently been repeated and emphasized in the case of *Moran* v. *Sturges*, 154 U.S. 256, reversing the judgment of the New York Court of Appeals in the case, *Matter of the Schuyler Steam Tow Boat Co.*, 136 N.Y. 169. The reasoning of this court in that case is entirely inconsistent with the contention of the defendants in error that the state court has power virtually to annul a decree of the federal court by enjoining the parties in whose favor it is rendered from taking the proper steps to enforce the decree.

III.

The court below had no right to inquire into the merits of the case, which was decided by the Circuit Court of the United States.

The following language of this court, used in reference to a judgment of the United States Circuit Court, well states a plain and well-settled proposition in regard to the effect of judgments or decrees of courts of competent jurisdiction: —

> "Their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit, and in every form where it is legitimately produced as the foundation of an action, or of a defense, either by plea or proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate. (*Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U.S. 141, 157, 158. See, also, *Covell* v. *Heyman*, 111 U.S. 176.)"

This case should not be confounded with those in which something has arisen since the rendition of the judgment to render its enforcement inequitable, as where the judgment of the federal court or of a sister state has been reversed upon appeal, or where it has since been paid or collected. (See High on Injunctions, sec. 269.)

The courts below seem to have thought that the rendition of the judgment in this case brings it within the doctrine above stated (see Opinions of Judge BARTLETT, Record, p. 535, and of Mr. Justice PUTNAM, Motion Papers, pp. 69, 70); but the "something" which must arise after the rendition of the judgment, in order to authorize a state court to prohibit its enforcement, must be a reversal or payment, or something of that kind. The judgment in this case depends entirely upon facts which existed before the decree in the United States Circuit Court was rendered, and it does not, as the learned justice states, "avoid" the certificates.

See opinion of Mr. Justice PUTNAM denying motion to strike out the clause in the judgment enjoining appellants from enforcing the judgment by a sale of the premises. (Motion Papers, pp. 69, 70, fols. 255, 256; also 69 Hun, 460.)

It certainly does not and could not pronounce void the agreement by which Foster and Hazard agreed to pay the certificates, which was adjudged by the United States Circuit Court to make them binding upon all the parties to the suit in that court.

Nor should the case be confounded with cases like *Barry* v. *Brune*, 71 N.Y. 262, where two parties claimed the same fund, and one brought a suit in the federal court without making the other a party, in which case a bill of interpleader was brought in this state, in which both parties claimant were made defendants as well as the judgment debtor, the insurance company; and it was held that a judgment might be entered restraining the collection of so much of the judgment in the United States Circuit Court as was held to be payable to the other claimant. This case would be analogous to that if there was some party claim-

ing to own the receiver's certificates other than the complainant and the other parties in the United States Circuit Court. But there is no question here that, if anybody was entitled to recover upon the certificates, it was the parties who prevailed in the United States Circuit Court. Neither the complaint nor the proofs in this case show any *facts* arising since the decree of the United States Circuit Court impairing the obligation of the defendants in that suit to pay as therein adjudged.

IV.

The other questions in the case have been considered in detail under sections 2, 3, 4, and 7 in the brief filed by Messrs. Hale and Hyde in this case.

V. The portions of the judgment referred to in the assignment of errors, namely, the part thereof perpetually enjoining and restraining the certificate holders from proceeding in any court whatever to enforce any lien upon or for the sale of the premises, and from suffering any such action or proceeding to be brought or prosecuted in their names; the portion thereof perpetually enjoining and restraining said certificate holders from proceeding with the sale under the decree, and from suffering said sale to proceed in their or any of their names or behalf; and all portions of the judgment which in any way interfere with, or reverse or nullify or set aside in whole or in part, the decree of the United States Circuit Court above referred to, should be reversed, and the cause remanded to the state court with directions to strike out such reversed portions of the judgment from the judgment, and to take

such further proceedings in conformity with the rights of the plaintiffs in error as established by the decree of the United States Circuit Court, as may be just and proper. Costs should be awarded to the plaintiffs in error against those defendants in error who were plaintiffs below.

W. S. B. HOPKINS,
WM. A. SARGENT,
Attorneys and of Counsel for the CENTRAL NATIONAL BANK, *Plaintiff in Error.*

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 38.

THE CENTRAL NATIONAL BANK OF BOSTON and others (holders of certificates issued by John W. Van Valkenburgh as Receiver of the Lebanon Springs Railroad Company,
Plaintiffs in error.

against

AARON R. STEVENS and others,
Defendants in error.

SUPPLEMENTAL BRIEF FOR THE CENTRAL NATIONAL BANK,

PLAINIFFS IN ERROR.

EVEN IF IT SHOULD BE CONCEDED—AND IT IS NOT SO CONCEDED—THAT THE STATE COURT HAD JURISDICTION TO ANNUL THE DECREE OF THE FEDERAL CIRCUIT COURT, THE CASE AS PRESENTED DID NOT JUSTIFY THE JUDGMENT AS RENDERED.

The Court of Appeals in its opinion in this case, relied upon the cases of Dupasseur v. Rocereau, 21 Wall. 130, 135, and Crescent City Live Stock Co. v. Butchers' Union, 120 U. S. 141-147, as authorities for its position, that where the jurisdiction of a Circuit Court of the United States depends upon the residence of the parties, "all that can be "claimed for the decree of the latter court is that "it be accorded the same force and effect as a simi- "lar judgment of the Supreme Court of New "York."

What this court said was (120 U. S. 147): "It "may be conceded that the judgments and decrees "of the Circuit Court of the United States, sitting "in a particular State, in the courts of that "State, are to be accorded such effect, and "such effect only, as would be accorded in "similar circumstances to the judgments and "decrees of a State tribunal of equal authority. "*But it is within the jurisdiction of this court, to de- "termine in this case, whether such due effect has been "given by the Supreme Court of Louisiana to the de- "crees of the Circuit Court of the United States here "drawn in question.*"

This court, under this decision, may, therefore, determine in this case, whether due effect has been given by the New York courts to the decree of the Circuit Court of the United States.

Clearly, such due effect has not been given.

First. The action was not brought within the time limited by the practice of the courts for the filing of a bill of review, or a bill in the nature of a bill of review, or a bill to impeach a decree for fraud.

"A bill of review for errors apparent upon the "face of the record will not lie after the time with- "in which a writ of error could be brought; for "courts of error govern themselves in this particu- "lar by the analogy of the common law in regard "to writs of error."

Taylor v. Charter Oak Life Ins. Co., 17 Fed. Rep. 566, citing Story Eq. Pl. sec. 410.

Thomas v. Harvies' Heirs, 10 Wheat. 146.

Ricker v. Powell, 100 U. S. 109.

Pacific R. Co. v. Mo. Pac. Ry. Co., 2 McCrary, 228.

In the State of New York writs of error are abolished.

Code of Civil Procedure, sec. 1293.

Bills for review have no place for errors appearing upon the face of the record. The only remedy is by appeal. Motions for new trials upon the ground of newly discovered evidence, or new actions to review for fraud, are not, in civil actions, regulated by statute. In all such cases, the party

volved in them. He was not a stockholder, bondholder, certificate holder or *cestui que trust.*

"It was admitted that the plaintiff, Stevens, "had no bonds which were acquired by him earlier "than November, 1886.'' (Record, p. 439.) It is a fair inference from the testimony of his counsel that the bonds were put into his hands merely to qualify him to be a plaintiff in this action. As to some of the plaintiffs there is no proof they are better situated than he. (Pp. 465, 466.)

One other seems to have been the owner before the time of the first foreclosure. (P. 93.) That is the plaintiff Rogers, who had bonds to the amount of one thousand dollars. It does not appear, however, that he was at any time a party to the action, prior to the issue of the fifth amended summons, which bears date the eighth day of December, 1890. (P. 3.) This was more than five years after the entry of judgment in the Sackett suit, and more than seventeen years after the sale under foreclosure of the first mortgage.

It is claimed and insisted that the Stevens' suit at this late day, could not be bolstered up and strengthened, by bringing in parties whose right to maintain an action, such as he sought to maintain, had been lost by lapse of time.

At the time Stevens acquired his bonds, the mortgage given to secure payment of these bonds had been foreclosed, and the road sold. The in-

debtedness created by the bonds had been merged in judgment. The bonds themselves had no existence, except as leaves of ancient history.

The Sackett suit had run its course. In that suit receiver's certificates had been issued, sold and confirmed. Judgment had been entered affirming the validity of the certificates. The road had been sold subject to the lien of the certificates. The purchasers had assumed and agreed to pay the certificates. If by these various steps and proceedings any one had been wronged, it was not Stevens. If Sackett had been acting in his own interest, instead of for the interests he pretended to seek to protect, Stevens suffered nothing thereby. If the receiver were uncalled for, or his certificates were improperly or improvidently ordered to be issued, it mattered not to Stevens.

Afterwards, when the present plaintiffs in error sought relief in court, because their certificates were not paid, Stevens had no concern in their proceedings. If the history of their proceedings aroused a chivalric feeling in his breast and inspired him to champion the cause of those who had been original bondholders, he could not arm himself for the contest by the mere posession of a few bonds which long before had been merged in the judgment of foreclosure and sale.

Even if the right to file a bill of review, or a bill to avoid a decree because of fraud be assignable, of

which there must be considerable doubt, such a right was not an inherent or appendage part of the dead bonds. It was not negotiable by mere delivery of the bonds. It could only have been transferred by some solemn instrument evidencing the intent to make that transfer.

Stevens gained no right to maintain his action by becoming owner of the bonds he holds.

So far from his having secured for himself an impregnable position, he has no standing at all.

He appears upon the record as a mere volunteer, invoking the judgment of the New York State court to restrain the Circuit Court of the United States from rendering a decree in a matter wherein it had undoubted jurisdiction of the parties and subject matter of the controversy. He has no rights which have been invaded. Merely to oblige his friend and patron, the counsel of many interests in this protracted controversy, he has voluntarily assumed the role of sufferer for hurts to others. He has no wrongs of his own to be redressed, and his procurement of bonds already merged in judgment gives him no claim to the protection of a court of chancery.

The other plaintiffs have no greater rights than he and their rights, if any, are barred by lapse of time.

Third. The proceedings in the Sackett suit authorizing the issuing of the receiver's certificates,

were proceedings *in rem*, and binding upon all the world.

Sackett claimed an equity in the road. The road was in the hands of Root, whom every one seems to characterize as a trespasser. Sackett had a right to invoke the aid of a court of competent jurisdiction to take the road out of the hands of the trespasser. The court did take possession of the road, and its receiver was put in possession. The possession was that of the court, and not of the plaintiff in the suit.

The court having the road in its possession, had jurisdiction to protect and preserve it. Its acts in holding possession and preserving the property, were proceedings *in rem*. The court had authority and jurisdiction to direct its receiver to borrow money to preserve the property. The receiver's certificates were issued under due authority, and when negotiated were valid as against all the world.

The case is analogous to that of a derelict upon the ocean. If brought into a court of admirality, that court could award salvage, no matter who might in fact be the owner. It could award payment for preserving the property. In this case the receiver's certificates were issued to pay for preserving the property. The road had been stripped of rolling stock and supplies. It was in process of decay. It was in the hands of the court,

and no question of parties could disturb the authority of the court to preserve the property.

Root was found in possession, and had the action been in ejectment, he would have been the only necessary party defendant. Sackett had an equity which is not even now questioned, and his suit was a due, proper and sufficient proceeding to confer upon the court jurisdiction to take the road into its possession. Having possession, it had power and authority to protect the road. Its acts in protecting the propery were unqualifiedly proceedings *in rem*.

There can be no question as to the general proposition of law, as a matter laid down in the text books, and as a principle sustained by the courts that administer justice under the common law and under the civil law, that a decree *in rem*, is conclusive as to all parties, and binding upon the whole world, and it is insisted that that principle of law can be invoked in the present case.

The principal cases which have arisen, and in which it has been established that judgments *in rem* are conclusive upon the whole world, are cases in admiralty, of seizure and forfeiture. Questions in such cases have arisen in England and America, under the common law, and in France under the civil law, and the result has been at all times the same.

The decision has uniformly been that a judgment *in rem*, in the admiralty courts, is, as is claimed

here, conclusive upon all parties against saying that the status of the thing adjudicated upon was not such as declared by the adjudication.

The universal effect of a judgment *in rem*, depends upon this principle, viz.: that it is a solemn declaration proceeding from an accredited quarter, concerning the status of the thing adjudicated upon, which very declaration operates accordingly upon the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be.

In Smith's ading Cases, the case of Trevivan v. Lawrence (alk. 276), is reported with a very full note, which includes the subject at present under consideration. There the result seems to be arrived at that where a judgment *in rem* has been pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose, such an adjudication, being a most solemn declaration from the proper and accredited quarter, that the status of the thing adjudicated is as declared, it concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication.

It follows that if our contention be well founded that the court had *jurisdiction* to order the issuing of the receiver's certificates, their validity cannot be anywhere questioned.

Fourth. It is stated in the brief of the learned counsel for the defendants in error (P. 33): "No-"body is questioning the soundness of the decree in "the United States Court. It was unquestionably "right. The jugment in this action necessarily as-"sumes that it was right."

Nevertheless, it is claimed that the State Court had a right to prevent the enforcement of this decree, which was "unquestionably right." That decree established the lien of the receiver's certificates, and adjudged their validity. This suit, commenced after the decree in the Circuit Court had been pronounced, assailed the validity of the cause of action, which had become merged in that decree. The claim is, that it swept away the foundation of that suit. But it was too late to do this after judgment. The decree of the Circuit Court could not be successfully assailed, because no charge was made against it, and it was conceded to be "unquestionably right." If "unquestionably right" the court ought not to have rendered any judgment which should absolutely annul it. This is what the State court has done.

Fifth. The State court has also vacated the sale under the original foreclosure in the suit of the Union Trust Co. against the Lebanon Springs Railroad, which took place in January, 1873. (P. 110.) This is upon the ground that the pur-

chasers at the foreclosure sales did not pay the purchase money. The regularity of the sale was not assailed in any way, and it appears from the testimony of Mr. Duncan that the purchase money was paid by a check, at the time of the sale, for $100,000, which check was received by the plaintiff in the foreclosure case, and was good at all times down to the 27th of July, 1875. (P. 452.) It is possible that this question of fact is not open for review in this court, because of there having been no assignment of error with respect to this particular finding of the State court. It is believed, however, that it is a matter worthy of consideration in connection with the claim made for the defendants in error, that the court has swept away the source of title to the cause of action upon which was rendered the decree in favor of the plaintiffs in error in the Circuit Court of the United States.

Sixth. It is facetiously said by Mr. Judge Bradley, in rendering the opinion of the Court of Appeals, that "the setting aside of the judgment in "the Sackett suit, upon which the suit in the United "States Circuit Court was founded, for fraud, estab- "lished a new fact occurring since the decree in that "court, which gave jurisdiction in this action to en- "join proceeding thereon." (Record, pp. 535-536.)

We say "facetiously said," for the learned judge must have recognized the fact that the decree in

the Sackett suit had not been set aside at the time of the rendition of the judgment in the Stevens suit. It was the judgment in the Stevens suit which set aside the judgment in the Sackett suit. It was the same judgment which restrained the plaintiffs in error from enforcing the decree of the Circuit Court. Priority in point of time did not exist. All the priority that could be claimed for the setting aside of the Sackett judgment before the enjoining the enforcement of the decree of the Circuit Court, arose from the fact that the part of the judgment which set aside the judgment in the Sackett suit was only a page of that judgment preceding the page upon which was written the part of the judgment in which a decree of the Circuit Court was enjoined.

COUNSEL FOR THE DEFENDANTS IN ERROR HAS FILED A SUPPLEMENTAL BRIEF, CALLING ATTENTION TO CASES RECENTLY ADJUDGED BY THIS COURT. IT IS RESPECTFULLY SUBMITTED THAT EACH AND ALL OF THESE CASES FULLY SUSTAIN THE POSITION OF THE PLAINTIFFS IN ERTOR, AND CALL FOR A REVERSAL OF THE JUDGMENT BELOW.

Moran v. Sturges, 154 U. S. 256.
Shields v. Coleman, 157 U. S. 168.
In re Chetwood, 165 U. S. 443.
In re Johnson, 167 U. S. 120.

The case of Moran v. Sturges, was a case in which proceedings had been taken in the Supreme Court of the State of New York seeking relief which involved the appointment of a receiver. A receiver was appointed by the court on the 31st day of July, 1891, but the receiver did not file his official bond and enter upon the discharge of his duties before the 4th day of August. On the first and third days of August, vessels belonging to the defendant in the action in the State court, were seized by United States marshals, under libels in admiralty filed in the proper District Courts. When the receiver thereafter went to take possession of the vessels, he found them in the custody of the marshal. The State court issued process to enjoin further proceedings on the libels in the District Court in the United States. This ruling was affirmed by the Court of Appeals, but the decision of the State court was reversed when brought before this court by writ of error.

The decision of this court appears to have been upon two grounds. First, that the United States court had acquired actual possession of the vessels before the State court had acquired jurisdiction over them, and, second, that the proceeding in the United States court was a proceeding in admiralty, and that the cognizance of admiralty causes by the Disrict Courts of the United States is exclusive

Mr. Chief Justice Fuller, in his opinion, states

this general rule, which was concurred in by all the members of the court, though two justices dissent from the judgment (p. 274): "It is a rule of "general application, that where property is in the "actual possession of one court of competent jurisdic "tion, such possession cannot be disturbed by pro- "cess out of another court."

In the case now before the court, the Circuit Court of the United States, by virtue of its decree, that the receiver's certificates had become a lien upon the property, and that the property should be sold for the satisfaction of that lien, had become possessed of the property in question. The subsequent proceeding in this case in the State court to restrain the execution of that decree, was a proceeding that was taken in direct violation of the principle of law above announced. The judgment rendered in the State court was likewise in violation of that principle. Under the authority claimed by the defendants in error, for a court to restrain proceedings in any other court, it might have been competent for the Circuit Court of the United States to have restrained the State court from proceeding to interfere with its judgment. But the recognition of the right to such an injunction cannot be construed in any way as authority generally to issue an injunction to restrain the proceeding of one court of competent jurisdiction, where another court, in an action commenced sub-

sequent to the decree in the court that has first jurisdiction, undertakes to stay proceedings upon the first judgment, for the sake of rendering is own judgment effectual.

In Moran v. Sturges, the chief justice cited the case of Dietzsch v. Huidekoper, 103 U. S. 494, and the counsel relies upon an expression in the opinion of Mr. Justice Woods in that case, as favorable to himself.

In the case last mentioned, an action of replevin had been commenced in a State court of Illinois. This action had been properly removed into the proper Circuit Court of the United States, but notwithstanding such removal, the plaintiffs had proceeded in the State court to carry on their action to judgment. Afterwards, in the State court an action of debt had been commenced on the replevin bond given in the State court, and the defendants filed their bill in the United States Circuit Court, asking an injunction to restrain the parties in the State court from prosecuting their suit upon the replevin bond. The Circuit Court granted the injunction, and after the preliminary injunction had become absolute and perpetual, the case was brought before this court.

The only question for decision here was, could the court below enjoin the appellants from proceeding in the action at law brought by them on the replevin bond in the Circuitt Court for Cook

county? This court held that it could, because the judgment in the State court had been rendered after the removal of the cause to the United States Circuit Court, and after the State court had lost all jurisdiction over the case. The appeal in the case before this court was held to be in substance a proceeding in the Federal Court to enforce its own judgment.

Because this court held that the relief was merely ancillary to the jurisdiction acquired, and necessary to give effect to its own judgment, the learned counsel seems to argue that the injunction in the State court here was ancillary to some jurisdiction which it had acquired over the property in question, when jurisdiction over that property was already vested in the Circuit Court of the United States by a decree rendered before this suit was commenced.

He further claims that in this case jurisdiction is not concurrent, but that the State court had an exclusive jurisdiction of the cause of action involved in the case.

It would seem as if it were unimportant to consider whether or not the jurisdiction was concurrent or not, because the fact is, that the Circuit Court had actual and exclusive possession of the *rem*, and had undoubted and unquestioned jurisdiction to render the decree which it had rendered. After that decree it was impossible that the State court

should have exclusive jurisdiction of a cause of action, which required the annulment of that decree.

In Shields v. Coleman, an order was made in the United States Circuit Court, appointing a receiver of the property of a railroad company. The receiver took possession, and two days after surrendered possession upon a bond being given for whatever sum might be decreed in favor of the plaintiff. Thereafter a bill was filed in the State Chancery Court of Tennessee, on behalf of sundry creditors of the railroad company, and other judgment creditors, seeking to reach the property of the company. A fiat was issued from the Chancery Court appointing a receiver, who immediately took possession of the railroad property, and commenced the operation of the road. Thereafter a receiver was appointed in the suit previously commenced in the Circuit Court of the United States, and the Circuit Court gave its receiver possession of the property, to the exclusion of the receiver already in possession, under the fiat of the State Court of Chancery.

This court held that the United States court had not power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a State court, and that it could not rightfully take the property out of the hands of the receiver so appointed by the State court.

The learned counsel for the defendants in error

seems to consider that it is a question of importance in that case, that the suit in the Federal Court was begun first. But this court does not appear to have considered that as a question of any importance. The court said, per Mr. Justice Brewer (pp. 178-179):

"When that court thereafter accepted a bond in "lieu of the property, discharged the receiver, and "ordered him to turn over the property to the rail-"road, and such surrender was made in obedience "to this order, the property then became free for "the action of any other court of competent jurisdic-"tion. It will never do to hold that after a court "accepting security in lieu of the property, has "vacated the order which it has once made appoint-"ing a receiver, and turned property back to the "original owner, the mere continuance of the suit "operates to prevent any other court from toch-"ing that property."

The difference between that case and the present one is radical. The Circuit Court of the United States, after having acquired jurisdiction, never has surrendered that jurisdiction. It has never left the property in question "free for the action of any other court of competent jurisdiction."

In re Chetwood was an original petition filed in this court, for the vacating of or prohibition upon certain orders of the Circuit Court of the United

States for the Northern District of New York, enjoining Chetwood from prosecuting a writ of error from this court in the name of the California National Bank of San Francisco, as plaintiff in error, and directing him to dismiss a second writ of error from this court, and to punish him for contempt of the Circuit Court in suing out writs of error. Leave was granted to file the petition, and a rule to show cause was entered, to which return was made.

It appeared that the comptroller of the currency had appointed a receiver of the California National Bank of San Francisco. Afterwards, the petitioner had begun a suit in a State court against certain officers and trustees of the bank, and the receiver, seeking to make the trustees and directors accountable for breaches of trust, &c. The petitioner had judgment. Thereafter, pursuant to the provisions of the statutes, the receiver was discontinued, and an agent of the bank was appointed to succeed him in the settlement of its affairs. This agent intervened in the pending action of the petitioner in the State court, and secured a direction in his behalf, that the recovery in favor of the petitioner was for the benefit of the agent, and the money recovered should be paid over to him. While the case was on appeal in the Supreme Court of California, and undetermined, the agent filed an original bill in the Circuit Court of the United States, alleging that

as such agent he was an officer of the United States, and had sole power to act for the bank and its shareholders, to the exclusion of the stockholders, directors and officers thereof. He claimed in his prayer for judgment, to be exclusively entitled to have and receive into his custody all the moneys and property of the bank, and to collect the outstanding indebtedness, whether evidenced by open accounts or judgments of record, and asked, amongst other things, that the petitioner be restrained from denying his right to the exclusive control of the assets of the bank, and from commencing further litigation, or defending any action theretofore brought.

The Circuit Court made an order that the petitioner be restrained from commencing any further litigation or suits, but not enjoining him from prosecuting or defending to final determination any actions then pending in the Supreme Court of the State of California, or in the Circuit Court. Thereafter the Circuit Court made an order to punish the petitioner for contempt of court, in suing out writs of error to this court, and in other matters.

Amongst other things decided in the case was, that the receiver appointed by the comptroller of the currency, and the agent appointed to succeed the receiver, were not officers of the court.

It was further held (p. 459): "The suit was "properly brought in the State court, proceeded to

"judgment, and was carried to the Supreme Court "of California on appeal. These courts undeni- "ably had jurisdiction over the suit and the parties."

Thereafter, Mr. Chief Justice Fuller said, as quoted by the counsel for the defendants in error (p. 460): "The doctrine is firmly established, that "where the jurisdiction of a court and the right of "the plaintiff to prosecute his suit in it have once "attached, that right cannot be arrested or taken "away by proceedings in another court," and that where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of concurrent jurisdiction.

To apply these principles to the present case, it is sufficient to say, that it is conceded that the plaintiffs in error properly brought their suit, and proceded to judgment in the Circuit Court of the United States, and that that court undeniably had jurisdiction over the suit and the parties. Their right to prosecute the suit having once attached, that right could not be arrested or taken away by proceedings in the State court. The railroad property having come actually into possession of the Circuit Court, being a court of competent jurisdiction, by virtue of the decree which it had made, that such property should be sold under the direction of the court, its possession could not be dis-

turbed by process out of the State court, whether that court be considered one of concurrent jurisdiction or not.

In re Johnson was a criminal case. The question in this case was as to whether jurisdiction to try the offense charged against the petitioner rested in the United States court for the Southern District of the Indian Territory, or in the court for the Eastern District of Texas. Mr. Justice Brown, giving the opinion of the court, says:

"If the United States court for the Eastern Dis-"trict of Texas had 'acquired jurisdiction' of this "case, manifestly it was entitled to try the peti-"tioner, but otherwise not."

Jurisdiction was held to be vested in the United States court in the Indian Territory of all offenses in that Territory of which the Texas court had not acquired jurisdiction before the first of September, 1896.

The question of the right to try the petitioner was made to turn upon the question as to which of the two courts had by actual arrest of the defendant first acquired jurisdiction over him, and in the course of the decision, Mr. Justice Brown used the language quoted by the learned counsel for the defendants in error, which make most emphatically for the plaintiffs in error.

The case of Marshall v. Holmes, 141 U. S. 589,

is not in conflict with any of these cases. In that case, one of the defendants in error had obtained several judgments in the courts of Louisiana against the plaintiff in error. She filed her petition in a District Court of Louisiana, asking an injunction restraining the collection of these judgments, upon her allegation that they were all obtained on false testimony, and forged documents, and that equity and good conscience required that they be annulled and avoided. Thereafter, she filed her petition for removal of her suit into the Circuit Court of the United States, upon the grounds that she was a citizen of New York, and the defendants citizens of Mississippi and Louisiana.

The court made an order refusing the application for removal. Upon the trial of the case, judgment was rendered dissolving the injunction, and authorizing the judgment creditor to execute the judgments enjoined. An appeal to the Court of Appeals for the Second Circuit of the State of Louisiana was prosecuted, and with some modification the judgment was affirmed. From that judgment Mrs. Marshall prosecuted the present writ of error. This court held that upon filing the petition for removal to the United States court, the State court was without authority to proceed further, if the suit in its nature were one of which the Circuit Court of the United States could rightfully take jurisdiction. It was then held that if the

circumstances were such as would authorize relief by a Federal Court, if the judgment had been rendered by it, and not by a State court, the Circuit Court had a right to deprive the party of the benefit of the judgments previously obtained in the State court.

To apply the authority of that case to the present case, it might be said that if the Circuit Court of the United States had by reason of citizenship of the different parties been able to acquire jurisdiction, and had acquired jurisdiction of the Stevens suit, it might have rendered the same judgment in the Stevens suit that the State court could have rendered in it, in so far as the relief sought consisted in setting side the Sackett judgment for fraud. But without any pretense or averment that there was fraud in obtaining the decree in favor of the plaintiffs in error in the Circuit Court of the United States, that decree cannot be annulled, merely because the State court might have had authority to set side the judgment in the Sackett suit. Before the Stevens suit was commenced, rights of parties had been fully adjudicated in the Circuit Court of the United States, and in order to give effect to that decree, it seems to be imperative that the judgment now brought before this court should be absolutely reversed. At least, it should be reversed to the extent of leaving the decree of the

Circuit Court in full force, and unaffected as an adjudication of the rights of the parties properly before the court.

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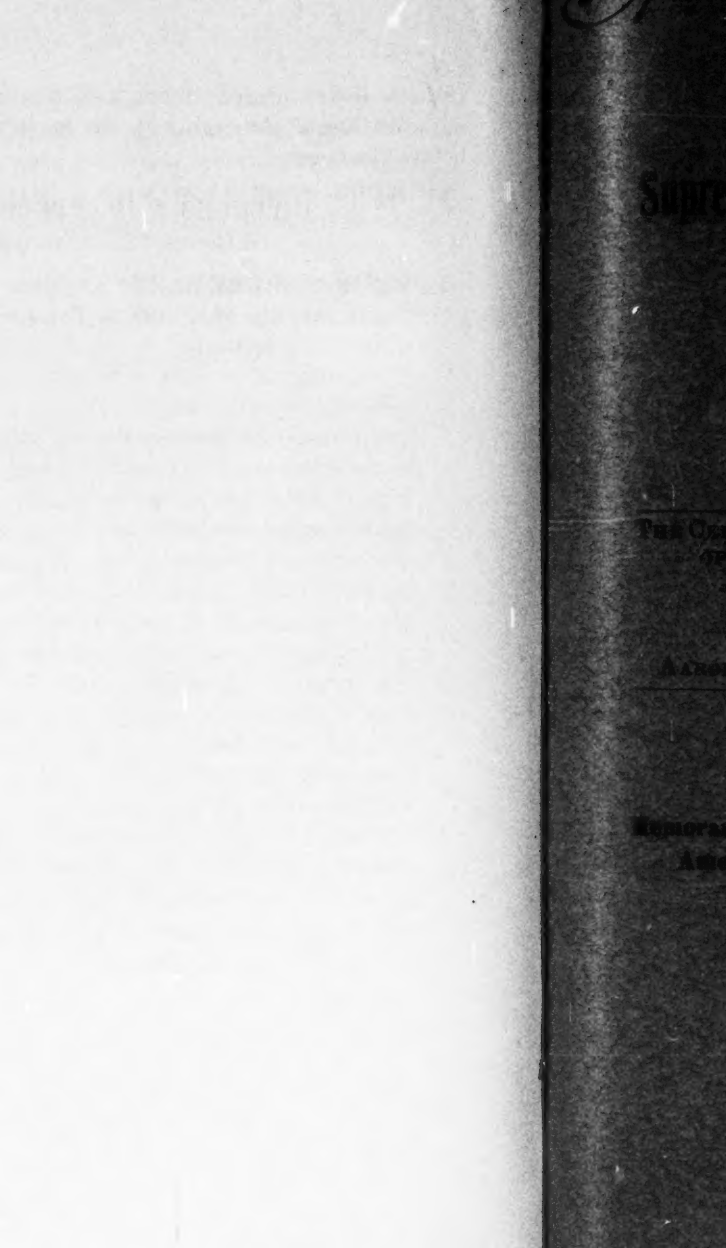

OCTOBER TERM, 1897.

No. 34.

CENTRAL NATIONAL BANK OF BOSTON ET AL.,
Plaintiffs in Error,
against
THOMAS R. STEVENS ET AL.

Memorandum for Plaintiffs in Error, on Motion to Amend the Mandate to the Court of Appeals of the State of New York.

CHARLES E. PATTERSON,
Of Counsel.

William Boyd, Printer, 395 Broadway, Albany.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 38.

THE CENTRAL NATIONAL BANK OF BOSTON ET. AL.,
Plaintiffs in Error,

against

AARON R. STEVENS ET AL.

Memorandum for Plaintiffs in Error on Motion to Amend the Mandate.

The mandate orders thus:

"It is now here ordered and adjudged by this "court that the judgment of the said Court of Ap- "peals in this cause, be and the same is hereby "reversed, with costs; and that the said appellants "recover against the said respondents, Aaron R. "Stevens et. al., one thousand and forty-seven "dollars and seventy cents, for their costs herein "expended, and have execution therefor.

"And it is further ordered, that this cause be, and "the same is hereby, remanded to the said Court of "Appeals for further proceedings not inconsistent "with the opinion of this court."

The opinion of Mr. Justice Shiras concludes with these words:

"The conclusions we have reached are that the "judgment of the Supreme Court of New York and "of the Court of Appeals affirming the same are er- "roneous in so far as they command the Central "National Bank of Boston, The Massachusetts "Mutual Life Insurance Company and other holders "of the receiver's certificates whose rights, as such "holders, were adjudged by the Circuit Court of the "United States to appear before the referee ap- "pointed by the Supreme Court in the present case, "and which enjoined the Central National Bank of "Boston and others, whose rights have been ad- "judged by the Circuit Court of the United States "for the Northern District of New York, from "proceeding with the sale under the decree of that "court, are erroneous."

This paragraph is followed by the mandatory words:

"*The judgments of the Supreme Court of New York "and of the Court of Appeals in these particulars are "accordingly reversed, and the cause is remanded to "that court for further proceedings not inconsistent "with the opinion of this court.*"

In the body of the opinion is found this language:

"Those portions of the degree of the Supreme "Court of New York and of the Court of Appeals "which sought to compel the complainants in the "suit pending in the Circuit Court of the United "States to come into the State court and to there "re-litigate their titles to the certificates and the "amounts thereof, and which sought to restrain "them by injunction from proceeding under the "final decree of sale of the Circuit Court, and from "enforcing the other remedies adjudged to them "by that decree, were, in our opinion, erroneous."

The words last quoted unquestionably state the decision of the court. It is, therefore, respectfully

submitted that, if it be corrected or changed, the mandate shall direct:

"That the judgment of the Supreme Court "of New York and of the Court of Appeals "affirming the same are erroneous in so far "as they command the Central National Bank "of Boston, The Massachusetts Mutual Life Insur- "ance Company and other holders of the receiver's "certificates whose rights, as such holders, were "adjudged by the Circuit Court of the United "States, to appear before the referee appointed in "the Supreme Court in the present case, and "which enjoin the Central National Bank and "others, whose rights have been adjudged by the "Circuit Court of the United States for the Northern "District of New York, from proceeding with "the sale under the decree of that court *and* "*from enforcing the other remedies adjudged to* "*them in that decree*, are erroneous; and, there- "fore, it is now here ordered and adjudged by this "court that the judgments of the said Court of "Appeals and of the said Supreme Court of the "State of New York be and the same are hereby "reversed with costs *in these particulars wherein the* "*same are adjudged to be erroneous;*" thereafter adding as in the original mandate, "and that the said ap- "pellants recover against the said respondents Aaron "R. Stevens et. al., one thousand and forty-seven "dollars and seventy cents, for their costs herein ex- "pended and have execution therefor.

"And it is further ordered, that this cause be and "the same is hereby remanded to the said Court of "Appeals for further proceedings not inconsistent "with the opinion of this court."

CHARLES E. PATTERSON,
Of Counsel for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

No. 568 of October Term, 1895.

The Central National Bank of Boston and others,
Plaintiffs in Error,
against
Aaron R. Stevens and others,
Defendants in Error.

Statement for Plaintiffs in Error Relating to Failure to Print Important Parts of the Record and Additions thereto by Defendants in Error.

This case relates to a conflict of jurisdiction between the State and Federal Courts. It is a part of a litigation that has been going on in the State and Federal

Courts of New York for some fifteen years. The record is voluminous, but to a proper consideration of the questions arising it is material that the whole record be before the Court. The Defendant in error has printed about one-fifth of the record, and those portions which he deems material to his view of the case. There are many and important portions of the record which the Plaintiffs in error deem material which have been omitted, including the pleadings and omission of findings of fact which we requested of the Court below. One question relating to the rulings and decision of the Judges of the State Court, which we deem material, we are unable to raise at all because of the omission to print the record in full. Certain papers which are not part of the record are also printed, viz., the last six pages of the record as printed, and, therefore, are not properly before the Court. We file this statement specially, not knowing otherwise how to bring the matter to the attention of the Court, as the Court under the rules, as we understand, declines to hear oral arguments upon interlocutory motions.

MATTHEW HALE,
HENRY D. HYDE,
For Plaintiffs in Error.

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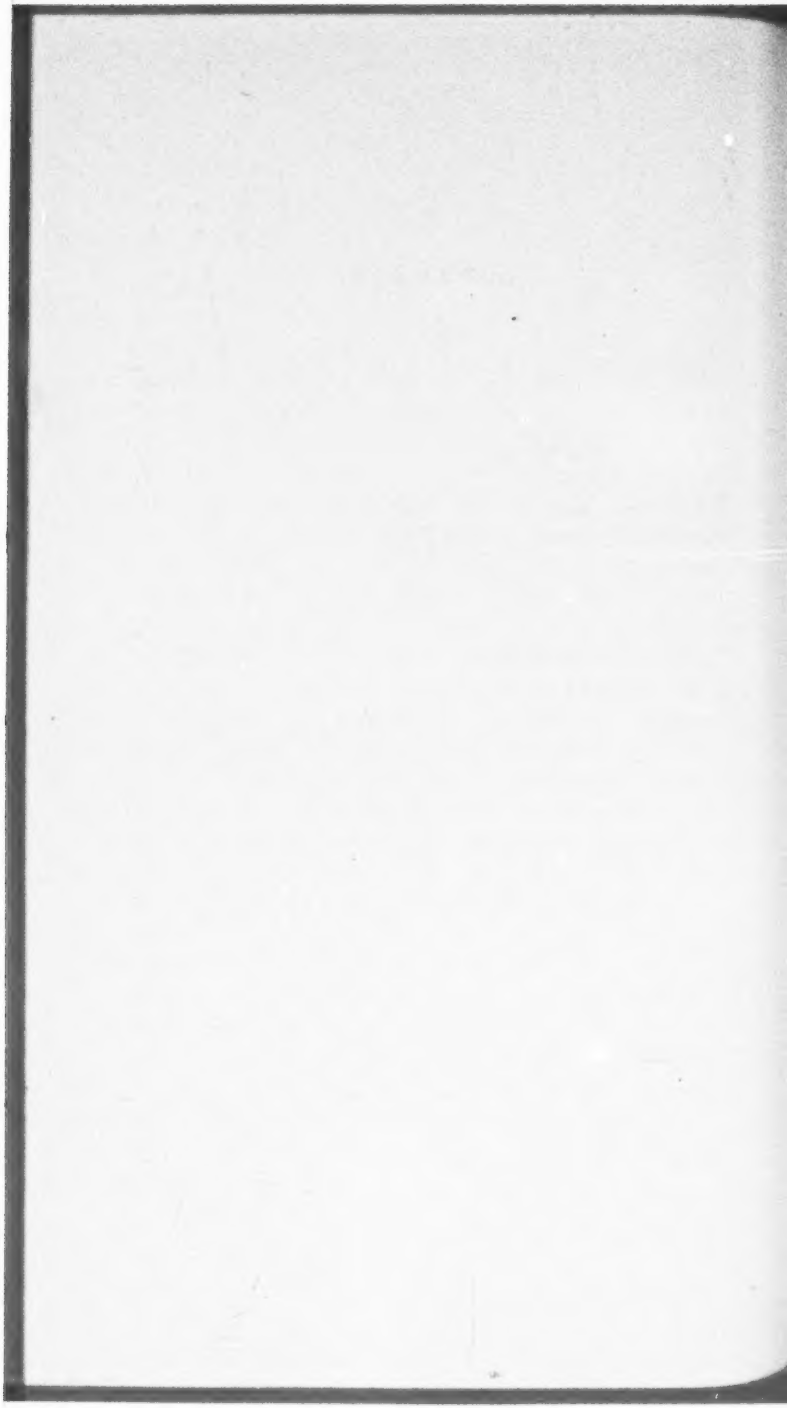

IN THE

Supreme Court of the United States,

No. 568 OF OCTOBER TERM, 1895.

CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS and others,
Defendants in Error.

On Motion to Dismiss or Affirm.

FOR THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

FIRST HEAD: This Motion.

This is a motion to dismiss the writ of error upon the ground that no Federal question is involved, and also to affirm the judgment below, for the reasons permitted by the rule.

The motion is made by the defendants in error, The Lebanon Springs Railroad (a New York corporation), Stevens, Rogers, Wilbur, Douglas and Harrison. All of these but the Lebanon Springs Railroad were the plaintiffs in the trial Court. The Lebanon Springs Railroad first came into the action in the Court of Appeals of New York, *claiming to*

have acquired by purchase the entire interest of the plaintiffs in error.

The case was tried to the Court without a jury, and the trial Court, according to the practice then in use in New York, found the facts and the law separately, and these findings are set out in the judgment.

As the assignment of errors does not raise any question but what the findings of fact are in accord with the evidence, and also does not raise any question that there was evidence tending to prove other facts which should have been found, but were not found, it follows that the findings of fact are both complete and incontestible. The evidence has therefore not been printed upon this motion.

The assignment of errors does not raise any question but what the judgment has wholly disposed of all the issues made by the pleadings. The pleadings, which consist of one hundred and forty-three printed pages, have therefore not been reprinted.

It is submitted that the judgment, together with the records of such events as have happened since, will intelligibly present all the questions.

SECOND HEAD: The Writ of Error and the Judgments below.

The writ of error brings up a judgment of the Court of Appeals of New York which had affirmed a judgment of the General Term of the Supreme Court of New York for the Third Department, which latter judgment had before that affirmed a judgment of the Saratoga Special Term of the Supreme Court of New York—the trial Court in this case.

THIRD HEAD: Facts in summary.

The plaintiffs were owners of some of the bonds secured by a first mortgage which the Lebanon

Springs Railroad Company, a New York corporation, had made upon its railroad to the Union Trust Company of New York as trustee. Default having been made in the payment of interest, the Union Trust Company brought an action to foreclose the mortgage, got a judgment of foreclosure and sale, sold, took the cheque of the purchaser for the purchase money, locked the cheque up in its vaults, never presented it for payment but has got it yet, had a deed of the railroad given by the Court officer to the purchaser's clerk, and put the purchaser in possession. The clerk then made, without any consideration, a mortgage to the purchaser for five millions of dollars, and, subject to that mortgage, conveyed the railroad, also for no consideration, to the New York, Boston and Montreal Railway Company, which was going to make a grand trunk line between New York and Montreal. The latter company promptly mortgaged the railroad to secure bonds to the amount of twenty-five millions of dollars; sold enough of them in France to realize six millions of dollars, and paid the purchaser out of it eight hundred and six thousand dollars.

They leased the railroad to the Central Vermont Railroad Company, which began operating it, and then both the purchaser and the New York, Boston and Montreal Railway Company failed, a receiver of the property of the latter was appointed, and already the assets had passed out of his hands, when the Central Vermont Co., having by the foreclosure of mortgage on another road lost its means of access to this railroad, abandoned it. It was directly taken possession of by a person who is supposed to have had some large property interests, but who, in the eye of the law, was a simple trespasser. He operated the road about a month, and then began the matters out of which the present questions arise.

One Sackett, who claimed to own $8,700 of the bonds secured by the mortgage to the Union Trust Company, brought a suit in the Supreme Court of New York against the New York, Boston and Montreal Railroad Company, its receiver, and the trespasser—*nobody else*. He alleged in his complaint that he brought it in behalf of all the other bondholders—the amount was two millions of dollars—as well as himself. He alleged the above given facts, including the non-payment of the purchase money, but made nobody concerned in that matter a party. The Railway Company and its receiver made default, as was expected. The trespasser put in an answer, but as he could allege nothing showing any right in himself, Sackett moved for a receiver and got one who took possession of the road. Having then successfully opposed two applications of other bondholders to get into the case, Sackett had his receiver make certificates to the amount of three hundred and fifty thousand dollars, which they sold for $236,500, and no more. Of this they divided up among themselves $115,807.04. What became of the rest does not appear—and then Sackett abandoned the action.

Four years afterwards $250,000 of the certificates having come into the possession of the Central National Bank of Boston,

(It took them for a precedent and bad debt of the failed Pacific National Bank.)

it forced the case to a trial, which took place between itself and the receiver, and, as a result, they entered a regular judgment, which adjudged a sale of the railroad, subject to the principal of the receiver's certificates, which the purchaser was to assume and pay. The sale was made to Foster for $155,000, the whole of which was absorbed in paying the debts of the receivership.

The trial Court has found as a fact in regard to

all of the proceedings in this action, as the result of a quantity of facts there given in detail, which in this summary are omitted, that it was not brought for the benefit of the other bondholders, but that it was brought to realize to Sackett and his associates certain claims which, if valid, were behind the mortgage.

Shortly afterwards the principal of the certificates coming due, and not being paid, the Central National Bank of Boston brought an action in the Supreme Court of New York, on behalf of itself and all the other certificate-holders, against Foster and a railroad company to which he had conveyed the railroad. This action the defendants moved into the Circuit Court of the United States, and there the complainant got a decree declaring the certificates to be a first lien on the railroad *in the hands of Foster and anybody claiming under him;* for a sale of the railroad and a decree against Foster for any deficiency.

Now comes this action.

The plaintiffs were original bondholders. They brought their action against

1. The Union Trust Company—the trustee.
2. The purchaser who gave his cheque, but did not pay it, and his clerk, the grantee at the foreclosure sale.
3. The New York, Boston and Montreal Railway Company, its receiver, and the trustees of its mortgages.
4. All the certificate-holders (plaintiffs in error here).
5. Foster and his railroad.

The action finally came to judgment.

(The road has been in the possession of a Receiver appointed in this action ever since March, 1887.)

The judgment finds the Sackett suit to be tainted with fraud in fact and wholly ineffectual, because having in it no parties who had any interest in the property. It sustained the complaint as a bill of review and reviewed and reversed the judgment and all the proceedings in that suit; specially vacated the order for the issue of the certificates, the sale and the referee's deed to Foster; it then sweeps away everything since the judgment in the original foreclosure action, under which was the sale upon which the purchaser gave his cheque which he did not pay; adjudges that that judgment be enforced and that the road be resold, giving equitable directions for the distribution of the purchase money.

At this time an advertisement for the sale under the decree of the Circuit Court of the United States in the action of the Central National Bank (into which all the other plaintiffs in error had come) was running. The judgment therefore enjoined all certificate-holders who were parties—*i. e.*, the plaintiffs in error—from proceeding with that sale and from suffering it to proceed in their names or behalf.

This is supposed to present the Federal question.

Thereupon Mr. Peter Butler, one of the certificate-holders, applied to Judge Wallace for instructions, and Judge Wallace ordered the Master to proceed with the sale, notwithstanding the injunction. He did so, and Foster bought, paid his money, got his deed—the sale was confirmed and Foster conveyed to the Lebanon Springs Railroad, a new corporation, one of the defendants in error.

The plaintiffs in error—certificate-holders—appealed from the judgment in this action to the General Term, which affirmed the judgment. They then appealed to the Court of Appeals, where the Lebanon Springs Railroad also appeared, and on proof of its deeds claimed to own all the interest

of the appellants, and prayed for the affirmance of the judgment. It was affirmed.

Directly after the sale under the decree of the United States Court the plaintiffs below brought two proceedings in the Supreme Court of New York, the one to punish Mr. Peter Butler and the other to punish all the other plaintiffs in error for the violation of the injunction in permitting the sale to go on. The proceedings have been terminated in favor of the plaintiffs in error, in the former on the suggestion of the death of Mr. Peter Butler; in the latter on the finding of fact that none of the other plaintiffs in error did violate the injunction.

The plaintiffs in error now say that there is a Federal question, because we got an injunction enjoining a judgment of the United States Court.

To this we answer:

1. That there is no Federal question because we got no such injunction.

2. That if we had, they cannot raise the question, because they sold, notwithstanding the injunction, got all the benefit of their decree, and have also parted with all their interest in the property, which is now owned by the Lebanon Springs Railroad, defendant in error, here in court asking the affirmance of the judgment.

3. That they cannot raise the question by virtue of being in peril of contempt, because it has been judicially and finally determined that they are not in contempt.

The above is a rough and incomplete statement of the main facts. A statement accurate and in detail now follows:

FOURTH HEAD: Facts in detail.

I.

Facts prior to the Sackett suit, found in the judgment.

The plaintiffs below were owners of bonds issued by the Lebanon Springs Railroad Company, and also of bonds issued by the Harlem Extension Railroad Company. Each of these classes of bonds was secured by a mortgage made to the Union Trust Company of New York as trustee.

The Union Trust Company was made a defendant, and thus the action is, in contemplation of law, the same as if it had been brought by the Union Trust Company itself as sole plaintiff (57 Hun, 511, top of page).

The Lebanon Springs Railroad Company was incorporated under the laws of New York, with many valuable powers, among others, the power to extend its lines into Vermont and Massachusetts. It constructed a railroad extending from Chatham, New York, to Bennington, Vermont, and at the time when the transactions to be spoken of begin it owned that railroad and was operating it.

On the first of July, 1867, it issued its bonds to the total amount of two millions of dollars, and to secure their payment it made a mortgage to the defendant, the Union Trust Company of New York.

On the ninth of February, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington and Rutland Railroad Company, whose railroad continued the line of the Lebanon Springs northwardly into Vermont, and thus was formed a new company called the Harlem Extension Railroad Company,

This last company on the first of April, 1870, issued bonds to the amount of one million and a

half of dollars and to secure them made a mortgage to the same company, the Union Trust Company, as trustee, conveying all its property and franchises, including, of course, all the property and franchises of both constituent companies.

The plaintiffs below own *both* kinds of bonds.

Default was made upon both kinds of bonds in 1870 and nothing has ever been paid since upon either issue.

In February, 1872, the Union Trust Company brought an action in the Supreme Court of New York to foreclose so much of the Lebanon Springs mortgage as related to the railroad in New York, and it filed two bills in the Court of Chancery of Vermont to foreclose so much of the Lebanon Springs and Harlem Extension mortgages, respectively, as related to the railroad in Vermont. The Harlem Extension Company was, necessarily, and was, in fact, a party to all three suits.

Judgment in the action in the Supreme Court of New York was got 10th December, 1872, and decrees in the two actions in Vermont were got 6th December, 1872. One of the decrees is printed at page 20 and the judgment at page 16. In strict conformity with the provisions of the mortgage, *it directs the payment of the purchase money to the plaintiff, the Union Trust Company* (fol. 68).

Pending advertisements of sale under the decrees, as well as the judgment, the Harlem Extension Railroad Company was, with a lot of other companies, whose roads, if constructed, would have extended its line southerly to New York, consolidated into a new corporation called the New York, Boston and Montreal Railway Company, which is a defendant in this action. This consolidation was 19th December, 1872.

Under the decrees in Vermont sales were made on the 20th January, 1873, to Trenor W. Park for $50,000 (25,000 in each case), and by direction of Park deeds were made by the Master to Charles G. Lincoln, who was in Mr. Park's employ, but *no part of the purchase money was ever paid* (fol. 103). The deeds were recorded two days afterward, 22d January, 1873.

Under the judgment in New York sale was made on the 25th January, 1873, to the defendant, William Butler Duncan, for one hundred thousand dollars. By direction of Duncan the referee made a deed to the defendant Hull, who was in Mr. Duncan's employ. Both Mr. Duncan's banking firm and himself failed within the following year, and no part of the purchase price upon that sale has ever been paid (fol. 103). This deed also was immediately recorded (fol. 103).

The Union Trust Company is a defendant in this action.

Three days after Hull got his deed, Hull and Lincoln, without any consideration, made a bond to Park and Duncan for *five millions* of dollars, payable August 1st, 1873, with interest, and to secure its payment they made a mortgage upon all the property under both deeds in both States. This mortgage was recorded in New York 14th February, 1873, and in Vermont 1st May, 1873 (fol. 104).

Two days afterward—30th January—Hull and Lincoln, by separate deeds, conveyed all the property to the New York, Boston and Montreal Railway Company, subject, however, to the five million mortgage, which they had given to Park and Duncan. These deeds were immediately recorded.

The New York, Boston and Montreal Railway Company then mortgaged the whole of the property and franchises to Brown, Seligman and Sherman,

defendants below, to secure bonds to the amount of twelve millions two hundred and fifty thousand dollars, and another mortgage to the New York Loan and Indemnity Company (whose surviving trustees are parties here) to secure bonds to the amount of twelve millions seven hundred and fifty thousand dollars. These mortgages were recorded in 1873, and enough of the bonds were sold abroad to realize *six millions* of dollars in cash, out of which Brown and Seligman, who received the money, paid to Duncan and Park $807,077.05 on the five million mortgage which had been given by Hull and Lincoln (fol. 112).

Next the New York, Boston and Montreal Railway Company failed, and a receiver of its property was appointed as early as April, 1875, and the active existence of both ceased during that year. They are parties to this action, but have made default.

Meanwhile the road had been leased to the Central Vermont Company, which operated it until the last of August, 1877. It was then taken possession of by the defendant Root, who organized under the manufacturing law of New York the corporation defendant called the Harlem Extension Railroad South Coal Transportation Company. Root was technically a simple trespasser. He had been interested in the Lebanon Springs Company from the beginning; was one of its directors and its secretary, and of course a stockholder, and is supposed to have had other property interests, but he had nothing which gave him a right to the possession of the road, and of course the Harlem Extension Railroad South Coal Transportation Company had no right at all. Root continued to operate the road in the name of that company, running regular trains, until the possession was taken from him by the Court.

II.

The Sackett Suit.

1. The trial Court found the following facts in the following words and figures:

Italics are ours of course.

"On the seventh September, 1880, one Marvin 'Sackett, who claimed to be the owner of bonds "issued by said Lebanon Springs Railroad Com- "pany to the amount of $8,700, brought an action "in this court against the said Russell C. Root "and the said Harlem Extension Railroad South "Coal Transportation Company, and also against "the said New York, Boston and Montreal Rail- "way Company and against the said Daniel But- 'terfield as its receiver.

"In his complaint he alleged that he brought the "action 'in behalf of himself and all others, bond- "'holders of the Lebanon Springs Railroad Com- "'pany, similarly situated, who hold any of the "'two millions of dollars of the bonds of the "'Lebanon Springs Railroad Company, herein- "'after referred to, and who shall be entitled to "'avail themselves of the benefit of the suit.' He "prayed for the sale of the whole of the said rail- "road property and franchises.

"He alleged in his complaint the fact of the "mortgage to secure his bonds, among others, to "the Union Trust Company of New York, its ac- "tions to foreclose, the sale under it, and the non- "payment of the purchase money.

"He did not make the Union Trust Company of "New York a party to the action.

"He alleged in his complaint the aforesaid sales "to Hull and Lincoln and their mortgage to Park

" and Duncan as aforesaid, and their conveyance " to the New York, Boston and Montreal Rail- " way Company as aforesaid. And that Hull and " Lincoln and Park and Duncan acted throughout " all those matters as the 'agents' and the 'repre- " sentatives,' and 'for the use and benefit' and for " the 'sole benefit and advantage' of the Lebanon " Springs bondholders; and that the mortgage " was given to Duncan and Park 'for' those bond- " holders, and that Park and Duncan held the " property as 'trustees' for those bondholders. He " did not make either Park or Duncan, or Hull or " Lincoln parties to the action. He did not make " any of the trustees under the two mortgages for " twenty-five millions of dollars parties to the ac- " tion, nor the trustees of the aforesaid mortgage of " the Harlem Extension Railroad Company.

" The summons and complaint in that action " were served upon the New York, Boston and " Montreal Railway Company 7th September, 1880, " and upon Daniel Butterfield as such Receiver, " 23d September, 1880. They both made default " and have never done anything.

" The summons and complaint were served upon " Russell C. Root and the Harlem Extension Rail- " road South Coal Transportation Company 7th " September, 1880. They put in joint answers " 25th September, 1880, which are in evidence.

" The plaintiff did not bring the action to trial " until the tenth of October, one thousand eight " hundred and eighty-*four*.

" He proceeded as follows:

" On the first of October, 1880, he moved for the " appointment of a Receiver, which motion, being " opposed by nobody, was granted, and John Van " Valkenburgh was appointed.

" This order was filed 7th October, 1880, and " Van Valkenburgh's bond was filed 11th October, " 1880. On the twentieth October, 1880, Root and " the Harlem Extension Railroad South Coal " Transportation Company abandoned the road. " On the twenty-fifth October, 1880, Van Valken- " burgh proceeded to borrow twenty-five thousand " dollars without giving any notice to anybody. " On the twelfth November, 1880, one Bloodgood " and six others claiming to own a majority of the " Lebanon Springs bonds, and who did own more " than three hundred thousand dollars of the same, " noticed a motion to be made parties to the action. " This motion was heard on the 27th November, " 1880, *and was opposed by the plaintiff and de-* " *nied.* The decision was made on the 28th De- " cember, 1880; an order was made and entered " on the tenth of January, 1881. The order denied " the motion, and directed the plaintiff to serve " copies of all papers and notices of every kind on " one F. L. Westbrook, who by the order was " authorized and allowed to appear as counsel *in* " *behalf of the said Bloodgood and the other six* " *bondholders who had joined in the petition* " ' upon all trials, hearings and motions.'

" *Said Westbrook finally declined to act, and so* " *finally declined before the hearing upon the* " *order for certificates of 2d April, 1881.*

" On or about the sixth November, 1880, said " Park and Duncan made an application to the " Court to be made parties to the action. They " alleged that they were the owners of over $300,- " 000 of Lebanon Springs bonds and over $600,- " 000 of Harlem Extension bonds, and that they " were the mortgagee under the mortgage made " by Hull and Lincoln, which the complaint al- " leged they held as trustees for the Lebanon

" Springs bondholders. The application for the " granting of this petition was *opposed by the* " *plaintiff*, was heard on the 27th November and " 10th December, 1880, and *was not granted.*

" *One Henry A. Tilden, who claimed to own* " *thirty Lebanon Springs bonds, was associated* " *with the said Sackett in the bringing of the* " *action. He retained the Hon. Hamilton Harris* " *as counsel therein, and assumed to control the* " *action.*

" The application of Bloodgood and the six " others was ended on the tenth January, 1881. " On the 23d February, 1881, the Receiver verified " a petition to the Court in form for instructions, " but with a suggestion that he issue certificates to " be made a first lien for, among other things, the " ' *settlement of unavoidable indebtedness of the* " ' *company now existing.*' He noticed this peti- " tion for hearing for the 4th March, 1881.

" On the 5th March, 1881, the plaintiff not ap- " pearing, an order was made appointing one Jones " an expert to examine the railroad. Said Jones " made his report 19th March, 1881. On the 2d " April, 1881, the report of the said Jones was " presented to the Court by the Receiver, when, " after hearing two counsel for the Receiver, and " nobody else appearing, the Receiver was ordered " to issue certificates of indebtedness to the amount " of $350,000, to bear interest at six per cent. and " to be a first lien upon the property. The order " also appointed one Strait referee to ' hear and " ' determine *all existing claims* against said Leb- " ' anon Springs Railroad Company.' " " This " order was filed 4th April, 1881.

" The Receiver got his first money on the 10th " May, 1881. *On the 20th April, 1881, the plaintiff,*

" *Sackett*, prepared a petition in which he says he " was '*obliged to collect, classify and arrange all* " '*the complication of facts and place them in* " '*the hands of his counsel for the purposes of* " '*preparation to bring the said action*,' and he " asked for $796.80 for himself and something for " his counsel. This was presented to the Court on " the 28th April, 1881, with notice to the Receiver. " *And the Court ordered the Receiver to pay the* " *plaintiff, Sackett, $796.80, and to pay the plain-* " *tiff's attorneys $1,200.*

" On the 18th May, 1881, one Andrews, who had " been one of the Receiver's counsel upon the ap- " plication for the order for the certificates 2d " April, 1881, presented a petition asking pay for " his services. This was presented to the Court on " the 20th May, 1881, and the Court ordered the " Receiver to pay said Andrews $900. On the " sixth of June, 1881, the Receiver presented a " petition to the Court praying for his compensa- " tion, and the Court made an order allowing him " five per cent. upon all sums received and dis- " bursed.

" On the 28th June, 1881, one Carpenter, ap- " pearing by the attorneys for the plaintiff, Sackett, " presented a claim to the Referee, Strait, for " $358.75 for ' services rendered at the special in- " ' stance and request of the said Lebanon Springs " ' Railroad Company.' The Referee gave him " judgment for that sum.

" *On the 28th June, 1881, the plaintiff, Sackett,* " *presented another claim to the Referee, Strait,* " *for $2,222.34 and interest for services rendered* " ' *at the special instance and request of the said* " ' *The Lebanon Springs Railroad Company.*' " *This claim the Referee, on the 30th June, 1881,* " *allowed at $3,000.04.*

" One Wm. F. Taylor presented a claim against " the Lebanon Springs Railroad Company to the " Referee, Strait, who allowed it at $2,500.

" On the 20th June, 1881, *the said Henry A.* " *Tilden presented, through the attorneys for the* " *plaintiff, Sackett, a claim for $23,967.37 against* " *the former Lebanon Springs Railroad Com-* " *pany for moneys expended at its request, after* " *the making of $2,000,000 mortgage. This claim* " *the Referee allowed on the 5th July, 1881, at the* " *whole amount.*

" From this time forward none of the defend- " ants ever appear to do anything in the action. " *And the plaintiff does nothing until the 23d* " *September, 1884.*

" On the 23d September, 1884, plaintiff's at- " torneys noticed the case for trial for the tenth " of October, 1884. On the tenth of October, " 1884, a trial was had between the counsel " for plaintiff, counsel for the Central National " Bank of Boston" (which was then and is still the largest holder of Van Valkenburgh's certificates), and for certain other holders of certificates who are now parties to this action, " and the " Hon. Hamilton Harris, who had been retained by " the said Henry A. Tilden for the plaintiff, and " had also received from the said F. L. Westbrook " authority to represent him.

" As a result the Court found among other things " that Hull and Lincoln held the title as trustees " for the bondholders, although neither was a party " to the action, and judgment was rendered direct- " ing the sale of all the railroad and property in New " York, subject to the principal of the receiver's " certificates, and directing the purchase money to " be applied in payment, first, of certain counsel

"fees and expenses of the receivership, and next, "the interest due on the receiver's certificates, and "directing any balance to be paid into Court.

"This was entered 27th January, 1885. The "Referee, after adjourning the sale three times, "sold to the defendant Foster, as Trustee, for "$155,000. This amount of $155,000 had been "made up by the receiver on the 2d June, 1885, "and was composed of the following items: Coun- "sel fees, $27,299.21; Interest on certificates, "$64,156.66; Receiver's commissions, $15,851.56; "taxes, $2,290.55, and debts of the receivership "the balance."

The Court also found as facts:

"That the Receiver Van Valkenburgh received "from the certificates two hundred and thirty-six "thousand five hundred dollars and no more." (Fol. 149.)

That the Receiver Van Valkenburgh paid $113,807.04 in claims to the plaintiff and his associates, counsel fees, interest on certificates, and himself. (Fol. 151.)

The Court also found as facts:

"*That the suit of* Sackett against Root *was* "*neither brought nor conducted for the purpose* "*of realizing the property to the owners of the* "*said Lebanon Springs bonds.*

"*That it was brought and conducted for the* "*purpose of realizing out of the property certain* "*individual claims of the said Sackett and Tilden,* "*in preference of and at the expense of the other* "*Lebanon Springs bondholders, which claims, if* "*valid, were not liens upon the property and were* "*behind the mortgage.*" (Fols. 151–2.)

The trial Court also found that certain persons, named in the finding, owning bonds to

the aggregate of twelve hundred thousand dollars were represented in the Sackett suit. Of these persons one Edward Crane had bonds for seven hundred thousand dollars, and the Receiver, Van Valkenburgh, had a large amount.

None of the persons who are thus found to have been represented in the Sackett suit are parties to this action, and none of them had then had their day in Court, *and accordingly the Court directed that this finding should not conclude them, and ordered a reference to ascertain which and how many of the bonds were actually represented in Sackett's suit.*

The result of that reference was to find the aggregate about $225,000.

III.

The suit of the Central National Bank of Boston in the Circuit Court of the United States.

Foster and Hazard became the purchasers at the sale, under the judgment in the Sackett suit.

In 1886 the Central National Bank of Boston, one of the plaintiffs in error, on behalf of itself and all other holders of the certificates issued by Van Valkenburgh, brought an action in the Supreme Court of New York against Foster, Hazard and the New York, Rutland and Montreal Railway Company, their grantee, and the American Loan and Trust Company, to which the latter railway company had given a

mortgage, and no others. The complaint set out the giving of the certificates; the sale subject to them to Foster and Hazard, and the personal assumption of their payment by the latter; and it prayed a sale of the railroad and a judgment over against Foster and Hazard for a deficiency. The defendants answered, not denying their liability, but denying that there was as much due on the certificates as was claimed in the complaint.

See the pleadings printed (fols. 16-89).

The defendants in that action, *not* the Central Bank, then moved the case into the Circuit Court of the United States for the Northern District of New York, where a decree resulted, which *first*

See the removal papers printed (fols. 91-106).

declared the certificates to be a lien upon the railroad "in the hands of the defendants herein, and "of any persons claiming through or under the "defendants Rowland N. Hazard and William "Foster, Jr., the purchasers of said premises and "property, at a sale thereof made under and in pur-"suance of the judgment rendered in said action" (Sacket suit) "in said Supreme Court" (of New York) "on or about the twelfth day of January, 1885."

Secondly, decreed a reference to William Lansing, Master, to report who, other than the Central Bank, were the holders of the certificates;

Third, decreed a sale of the railroad by Frothingham, referee, and

Fourth, made a decree over against Foster and Hazard for any deficiency.

See the decree printed (fol. 107).

Upon the reference before the Master all the plaintiffs in error, other than the Central National

Bank, came into the action and proved their certificates under the decree.

See his report, made 7 February, 1888 (fol. 124).

Under this decree a sale had been advertised, but not as yet made, when the judgment below was rendered.

This is the sale which the plaintiffs in error were, by the judgment below, enjoined from proceeding with.

IV.

This Action.

It was brought March, 1887, within a few months after the termination of the Sackett suit.

The plaintiffs below were the owners of both kinds of bonds—Lebanon Springs and Harlem Extension—and two of them had had theirs ever since 1867.

All persons were made parties, including

1. The Union Trust Company.
2. The owners of the five-million mortgage, being Park's administrator, Duncan and Duncan's assignee.
3. The New York, Boston and Montreal Railway Company, its receiver, and the trustees of the mortgages under which the bonds were sold in France.
4. Sackett and all the parties to his suit.
5. All the certificate holders—plaintiffs in error here.
6. Hazard and Foster, their railroad company, and its mortgagee; thus, of course, including all the parties to the Central Bank's suit in the Circuit Court of the United States.

All of these parties put in answers (fols. 9–13), and fought the case until the judgment of the General Term of the Supreme Court, beyond which the facts could not be questioned. The certificate holders—plaintiffs in in error here—alone took the case to the Court of Appeals.

The issues thus framed in the action having been tried, the Court found the facts above given, and among its conclusions of law from those facts, it found in regard to the Sackett suit as follows:

"4. That the action brought in this Court by "Marvin Sackett was not a representative action, "for the reason, *first*, that it was not so in fact, "nor intended to be, and *second*, because the "Union Trust Company was not made a party; "and inasmuch as upon the face of the records of "this court it professes to be the action of these "plaintiffs and all other owners of Lebanon "Springs bonds, and to sell and dispose of all their "interest and that of the Union Trust Company "in the property and franchises, the plaintiffs and "all the other holders of such bonds and the "Union Trust Company are now entitled to have "the judgment and all the proceedings in that "suit, incluing the sale and the deed by the Ref-"eree to the defendants Foster and Hazard, re-"viewed and reversed" (fols. 156–8).

V.

The Judgment below.

The judgment adjudged that all the proceedings since the New York foreclosure judgment and the Vermont foreclosure decrees of 1872 should be set aside, and that the Union Trust Company as trustee

under both mortgages was entitled to have that judgment and those decrees now enforced.

That all the proceedings in Sackett's suit were tainted with fraud, and erroneous because the Union Trust Company was not a party.

And it adjudged that the judgment and the decrees of 1872 be enforced, and the property be sold under them (fols. 172–3).

It substantially set aside everything which had been done since the making of that judgment and those decrees, reviewed and reversed the proceedings and judgment in Sackett's suit, and set aside the sale and the Referee's deed under that judgment.

It enjoined all similar suits by other bondholders, and all other remedies, suits and proceedings of every kind, *including* the prosecution *by the parties to this action* of the sale under the decree of the Circuit Court of the United States.

> The language of that part of the judgment is, "That the defendants, "the Central National Bank of Boston, Peter Butler as receiver of the "Pacific National Bank of Boston, the Massachusetts Mutual Life Insur- "ance Company, Mary Strait, William C. Van Alstyne, Esther K. "Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis "A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland "N. Hazard, the New York, Rutland and Montreal Railway Company "and the American Loan and Trust Company, and all other owners of "certificates issued by the said Van Valkenburgh as receiver as afore- "said, and each of them, and their, and each of their officers, agents, "servants and attorneys are hereby perpetually enjoined and restrained "from proceeding with the sale under the decree in the action brought "by the defendant, the Central National Bank of Boston, against the de- "fendants Hazard, Foster, the New York, Rutland and Montreal Rail- "way Company, and the American Loan and Trust Company, a copy of "which is attached to the answer of the Central National Bank in this "action, and from suffering the said sale to proceed in their or any of "their names or behalf" (fols. 170-2).

It directed that *so much of the proceeds of the sale as would go to all such bonds as were owned by persons who were represented in Sackett's suit should go to the certificate holders*, and it directed a reference to ascertain which bonds were so represented.

VI.

Events which have happened since the judgment.

In defiance of the injunction contained in the judgment the defendant, *Peter Butler*, applied to the Circuit Court of the United States in the action in that Court for a direction to the Master *pro hac vice* to sell, notwithstanding the injunction. Upon that application the Court wrote the opinion reported in 49 Fed. Rep., a copy of which is in the accompanying papers (fol. 268). As the result of that opinion the Master *pro hac vice*, on the twenty-third of March, 1892, sold the things which, by decree in that action, it had been decreed that he should sell, and they were bought by William Foster, Jr.; the purchase money was paid; the deed delivered (fol. 323), and the sale confirmed (fol. 340) and the Master *pro hac vice* delivered his deed accordingly on the twenty-seventh day of April, 1892.

William Foster, Jr., then conveyed the same things to the Lebanon Springs Railroad, a New York corporation (fol. 298).

On the twenty-fourth day of April, 1894, the Lebanon Springs Railroad, by resolution of its Board of Directors, stipulated that the judgment in this action be affirmed, and directed the president of the company to make a formal stipulation, and to have a motion made to that effect.

Upon proof of these facts to the Court of Appeals, the Lebanon Springs Railroad and the plaintiffs below, moved in that Court for the affirmance of the judgment (fol. 292) and it was there affirmed.

VII.

The contempt proceedings.

After the order made by Mr. Circuit Judge Wallace directing the Master *pro hac vice* to proceed with the sale, the plaintiffs below began two proceedings in the Supreme Court of New York.

One, to punish Mr. Peter Butler for a violation of the injunction, *the other*, to punish all the other plaintiffs in error for a violation of the injunction.

These proceedings were both heard by the Court upon the day before that upon which the sale actually took place and were not immediately determined.

They have since been finally determined, the one secondly mentioned upon a finding of fact by that Court that none of the plaintiffs in error other than Mr. Peter Butler had in any way violated or disobeyed the injunction (fols. 418, 424).

The proceeding against Mr. Peter Butler was finally dismissed upon a suggestion to the Court of Mr. Peter Butler's death.

The final orders in these proceedings are given in the accompanying papers. Although not contained in the record of this action, they, as records of the Court can be read here in support of the judgment.

Bank of Charleston *vs.* Emerie, 2 Sand , 719.

Catlin *vs.* Grissler, 57 N. Y., 363, 373.

BRIEF OF THE ARGUMENT.

I.

The plaintiffs in error are not in the position to question the validity of the injunction.

The sale, against which the injunction was directed, actually took place notwithstanding it, and they are therefore in precisely the same position as if the injunction had never been put in the judgment. The one thing which it forbid is done, and done irrevocably. The force of injunction is therefore gone forever.

Nor can they question it because they stand in peril of punishment for having violated it. Because it has been judicially and finally determined that they are not in any such peril.

What is more, the sale passed all their interest in the property. If they had a lien upon the railroad, as they claim, that lien, whatever it was, is now owned by the Lebanon Springs Railroad, defendant in error, one of the moving parties.

There is something in the affidavit of Mr. Bulkley in opposition to the motion in the Court of Appeals in regard to the sale being void because in violation of the injunction (fol. 352), but even if this were so it would still have passed their lien whatever it was.

"It is enough that an irregular or void judicial "sale, made at the instance of a mortgagee, passes "to the purchaser all the rights the mortgagee, "as such, had."

Brobst *vs.* Brock, 10 Wall., 519, 534.

But the sale was not void. It was good. If a human being who has title to land gives liberty of

seizure of it, the title passes, notwithstanding he may disobey an injunction in doing so (Butler *vs.* Niles, 35 How. Pr., 329, 331), and notwithstanding that the Court of Chancery which issued the injunction may have him, next instant, crushed to death by way of punishment for the violation of it. Of course, if the injunction was issued in an action, the pendency of that action binds the purchaser.

Union Trust Co. *vs.* South. Navigation Co., 130 U. S., 570,

and if it be ultimately determined in that action that he did not own the land, of course the purchaser gets nothing, but not because the grant was in violation of the injunction, but because the grantor had nothing to convey. If he had something, his deed would convey it, whatever he had.

But the sale in question was not even in violation of the injunction The injunction did not forbid the sale. It forbid *the parties* from proceeding with the sale and from suffering it to proceed. They did neither. It was the Court which made the sale, and there is not one word in the injunction which can be tortured into the slightest hint against it. Furthermore this has been judicially determined. So far as the plaintiffs in error are concerned, the Supreme Court of New York has finally adjudged that they did nothing in violation of the injunction. Therefore they did not "proceed," nor did they "suffer" the sale. As for Mr. Peter Butler, he is dead (fol. 427), and of course he is not here.

Lastly—were the law otherwise—it would hardly lie in the mouths of the plaintiffs in error to allege their own violation of the injunction in order to avoid their own sale upon which they received the purchase money, which they still retain. The injunction was got solely at the suit of the defendants in error, and they can condone a violation of it, or

stipulate or admit it away, if they please. The sale at the very utmost could only be voidable at their election—

> That the only interest of the plaintiffs in error is as certificate holders appears not only by the report of the Master, Mr. Lansing, who found who were certificate holders under the decree of the Circuit Court of the United States (fol. 129), but by their notice of appeal to the Court of Appeals. They are there described, for the most part, not by name, but as "certificate holders" (fol. 266). If they are not certificate holders therefor, they were not parties to the action in the Court below, and the writ of error must be dismissed for that reason.

It follows that even if a Federal question was originally presented by the allowance of the injunction, the plaintiffs in error cannot raise it—because they have sold and conveyed away their right to raise it—and their assignee is here insisting that they shall not raise it.

II.

The question presented by the injunction is not a Federal one.

The only possible argument to the contrary is that because the Circuit Court of the United States is created by, and owes its continued existence to, an act of Congress, therefore, to question one of its decrees is to construe a law of the United States.

Whether or not this would be so in an ordinary case, it is submitted that in this case it is not so. Nobody is here questioning the decree of the Circuit Court of the United States in the smallest particular. It was unquestionably correct.

It professes on its face to deal only with the title of the defendants to that action (fols. 119–110)—a title the source of which was the Supreme Court of New York. *That Court has swept away that*

source, as it had a right to do, and the whole foundation of what was being contended about in the action in the Circuit Court of the United States falls from under that action.

III.

The injunction was correctly adjudged; equity required that the parties to this action should not be permitted to proceed with the sale under the decree of the Circuit Court of the United States.

That sale was a sale of the title sold in the Sackett suit.

The sale in the Sackett suit has been set aside by the judgment in this suit; the title under it extinguished, and a resale ordered.

It followed necessarily that the then pending sale should be enjoined as a matter of course.

I.—At least six ordinary and familiar rules required this.

FIRST.—When equity undertakes to adjust the interests in regard to the particular matter, it is her duty to do it *completely*, to give *complete* relief.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 34 N. Y., 30, 45.

The ultimate relief granted in that case was in accordance with the prayer of the complaint italicized at page 32 of 34 N. Y. The Special Term had permitted actions

for damages to progress so that they might be tried by juries (38 Barb., 534, 567). This was reversed and the damages assessed in the equitable action (34 N. Y., 33).

Barry *vs.* Brune, 8 Hun, 395, 405.

But *complete* relief would not have been given if the sale in the Central Bank's suit was permitted to proceed.

For it is obvious that two antagonistic sales of the same property should not be permitted at the same time. Mr. Hale has always claimed that he had the first lien and that his sale would give a complete title. We have always claimed that we had the first lien and that our sale would give a complete title. The two sales were going almost simultaneously—hostile titles to the same property, sold at about the same time. Each would, of course, lessen the price to be brought by the other. Neither would bring full value. It follows that but one should have been permitted. All parties were present in this suit and there was and could be no question but that the sale under the judgment in it would give a good title. But very few of the parties were present in the Central Bank suit, and the Court had just held that the sale in the Central Bank suit would give no title at all. The latter sale was, therefore, the one to be stopped.

It is quite apparent that the fact of a sale taking place in the suit by the Central Bank would reduce the value of the property and

lessen the amount to be realized upon the sale in this action.

That is quite sufficient reason for stopping it.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 17 N. Y., 592, 601.

SECONDLY.—The conveyance to the purchaser, under the sale in the Central Bank's suit would create a cloud upon the title. This is sufficient reason for stopping it, and it makes no difference that the purchaser under the sale in this action would have a defense.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 17 N. Y., 592, 601, 600, 598.

THIRDLY.—It was against equity and good conscience that the sale in the Central Bank's suit should proceed.

N. Y. & N. H. R.R. Co. *vs.* Haws, 56 N. Y., 175, 181.

FOURTHLY.—The ordinary rule as to the prevention of multiplicity of actions required it.

Their sale and interests acquired under it would naturally give rise to plenty of litigation, and that directly.

FIFTHLY.—This was the case of a judicial *sale*, *i. e.*, the sale in the Sackett suit, being set aside and a re-sale ordered, in which case all persons who hold under the sale set aside must be made parties and the title taken from them, in order that

the Court may sell it again. It is matter of course.

Hale *vs.* Clauson, 60 N. Y., 339, 341.

The foreclosure of a mortgage given to secure a judgment will be enjoined, when the judgment is set aside and an accounting ordered.

King *vs.* Duryea, 76 N. Y., 626.

In that case the stay was by motion in the action, but it need not be, and in this case could not be.

N. Y. & N. H. R.R. Co. *vs.* Haws, 56 N. Y., 175, 180.

SIXTHLY.—The *judgment* in the Sackett suit having been set aside, all proceedings under it should be stopped, and the judgment or order which set it aside should provide for that.

Chamberlin *vs.* Choles, 35 N. Y., 477.

II.—Mr. Hale's argument below was that the part of the judgment in question in some way overruled or reversed the decree of the Circuit Court of the United States. This is quite ungrounded in fact. No question which was involved in that suit, is in this. That was a private controversy between a few of the parties to this suit as to which of them owned the property which had come down to them under the sale in the Sackett suit. *This suit swept away the common source of their title.* It has nothing at all to do with their private squabbles.

Mr. Hale reached the point of the matter

when he said in his first brief below that "This case should not be confounded with "those in which something has risen since "the rendition of the judgment to render its "enforcement inequitable."

The reverse is the fact. Something *has* arisen.

The judgment swept away the title which was being quarrelled over in that case and otherwise gave to all the parties in that action complete relief. It followed that the relief which had been given by that action should be enjoined because its enforcement would now be inequitable.

Nobody is questioning the soundness of the decree in the United States Court. It was unquestionably right. The judgment in this action necessarily assumes that it was right, and follows its provisions so far as the distribution of the proceeds among the parties to that suit is concerned.

If that decree were a judgment of the Supreme Court of New York there would be not a doubt of the parties to this suit being enjoined from going on with it.

III.—It being necessary to enjoin the parties in this suit from proceeding with that sale, no embarrassment is occasioned, nor does it make any difference that that sale is under the decree of another Court.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 17 How. Pr., 464, 468.

N. Y. & N. H. R.R. Co. *vs.* Haws, 56 N. Y., 175.

Nor does it make any difference that that

other Court is the Court of another sovereign.

Vail *vs.* Knapp, 49 Barb. 299; Claflin *vs.* Hamlin, 62 How. Pr. 284.

Cairon Iron Company *vs.* McClaren, 5 H. L. C., 416.

Per Ld. Cranworth, p. 439.

Per Ld., St. Leonards, pp. 452–455.

Cole *vs.* Cunningham, 133 U. S., 107.

Nor that that other sovereign is the United States of America.

Embry *vs.* Palmer, 107 U. S., 3.

a. The reason of the thing.

Any other rule would prevent a Court of Equity from giving *complete* relief in dealing with a *res*. It would be very easy for two or three of the parties to such an action, who wished to defeat the jurisdiction, to get among themselves a judgment of the United States Court interfering with a part of the proposed relief.

The rule of comity prevents a State Court from interfering with a United States Court upon the same issue, and it is to be supposed that no Court would so interfere. But where this Court sweeps away a title given by one of its own judgments, and gives to the parties and privies under that judgment complete relief on the basis of an adjustment of all interests, it should stop all proceedings based upon the title thus swept away, even if in the United States Court.

b. And such is the law of New York, well settled by many adjudged cases.

Barry *vs.* Brune, 71 N. Y. 262;

Dinsmore *vs.* Neresheimer, 32 Hun, 204;

People *vs.* Erie Ry. Co., 36 How. Pr., 129.

Barry vs. *Brune* was this:

Mrs. Barry had a life insurance policy. Her husband got her to let it lapse, and took out a new policy to himself. Brune was the assignee of the husband. Brune brought an action upon the policy against the insurance company in the Circuit Court of the United States for the district of Maryland, and got a judgment. Mrs. Barry was not a party to that action. To the action of *Barry* vs. *Brune* in the Supreme Court of New York all were parties.

The Court at General Term said (8 Hun, 395): "Complete redress could be awarded "in no other way. As the judgment in the "other case was not actually satisfied of "record, its future collection, on the pay- "ment of the money to the person entitled "to receive it, or its deposit in Court for "her, was lawfully enjoined. (Savage "*vs.* Allen, 54 N. Y., 458; N. Y. and "Harlem R.R. *vs.* Haws, 56 N. Y., "175). The case was a special one, "and the controversy was properly termin- "ated in that manner. There would have "been no reason in allowing it to remain "open for future litigation upon the same "evidence in the Courts of another State. "But as this action was the first and only "one commenced for the purpose of settling "the conflicting claims made to the insur- "ance money, by a party who was a citizen "of this State, and all parties having any

"interest in the controversy were brought "before the Court, it could do no less "than it did, under the well settled prin- "ciples of equity jurisdiction, which re- "quired that the dispute should be com- "pletely and effectually disposed of by the "judgment finally rendered in the case. "(Rathbone *vs.* Warren, 10 Johns., 587; "Miller *vs.* McCann, 7 Paige, 451; Elliott "*vs.* Pell, 1 *id.*, 263, 268; Jones *vs.* Grant, "10 *id.*, 348, 350). Any different disposi- "tion would have invited further litigation "between some of the parties without being "attended by any beneficial result not "attainable in the present action." (pp. "404–405).

In the Court of Appeals Mr. Nash made a most elaborate brief, but this Court affirmed the judgment.

561 Ct. Appeals Cases (State Library).

c. All parties and privies, no matter how remote in the chain of title, by taking title under the Sackett suit, submit themselves to the jurisdiction of the Court below.

Hale *vs.* Clauson, 60 N. Y., 339, 341.

This, of course, includes all of the plaintiffs in error.

d. In contemplation of law, the Central Bank's suit was not in the United States Court. It was originally brought in the Supreme Court of New York, and although removed into the United States Court, was still to be determined and governed by the

laws and rules which govern the Supreme Court of New York, and by which that Court determines the controversies brought to its attention.

All that the decree of the United States Court is entitled to is the *same* force, effect and credit which would be given to a similar judgment of the Supreme Court.

"It is apparent, therefore, that no "higher sanctity or effect can be claimed "for the judgment of the Circuit Court "of the United States rendered in such a "case (where jurisdiction is derived from "citizenship), under such circumstances, "than is due to the judgments of the "State Courts in a like case and under "similar circumstances."

Dupasseur *vs.* Rochereau, 21 Wall., 130, 135.

"That the judgments and decrees of the "Circuit Court of the United States, sit-"ting in a particular state, in the courts "of that state, are to be accorded such "effect *and such effect only*, as would be "accorded in similar circumstances to the "judgments and decrees of a state tribu-"nal of equal authority."

Crescent Live Stock Co. *vs.* Butchers' Union, 120 U. S., 141, 147.

And that was given to it by the judgment in this action.

e. The cases cited below by Mr. Hale have no application. They hold that a State Court cannot enjoin a Court of the United

States. Nobody pretends that it can. And nobody has attempted to do any such thing.

No conflict of jurisdiction or process is possible. There is nothing in this judgment which interferes with the decree, or the process, or the officers of the United States Court. They can go on if they like. They have gone on. Nothing has been served upon them, and it would not be of the least effect, if it were, for there is not a word in the judgment which can be construed as applying to them. The judgment binds the parties to this action and nothing more. And the difference between the two things is not technical, nor verbal merely, it is *substantial.*

Dehon *vs.* Foster, 4 Allen, 545, 550.

Dehon *vs.* Foster, 7 Allen, 57.

Van Gilder *vs.* Van Gilder, 26 Hun, 356, 360.

And the Courts of the United States hold the same thing.

Embry *vs.* Palmer, 107 U. S., 3.

In reviewing a decree of the Supreme Court of Errors of Connecticut, which enjoined the parties from proceeding on a judgment of the Supreme Court of the District of Columbia—

The Court said, p. 10:

"That the Supreme Court of the Dis-
"trict of Columbia is a Court of the
"United States results from the right of
"exclusive legislation over the District
"which the Constitution has given to

"Congress. Accordingly, the judgments "of the Courts of the United States have "invariably been recognized as upon the "same footing, so far as concerns the "obligation created by them, with domes- "tic judgments of the States wherever "rendered, and whenever sought to be "enforced. *Barney* vs. *Patterson*, 6 "Har. & J. (Md.), 182; *Niblett* vs. *Scott*, "4 La. Ann., 246; *Adams* vs. *Way*, 33 "Conn., 419; *Womack* vs. *Dearman*, 7 "Port. (Ala.), 513; *Pepoon* vs. *Jenkins*, "2 Johns. (N. Y.) Cas., 119; *Williams* vs. "*Wilkes*, 14 Penn. St., 228; *Turnbull* vs "*Payson*, 95 U. S., 418; *Cage's Ex'rs* "vs. *Cassidy*, 23 How., 109; *Galpin* vs. "*Page*, 3 Sawyer, 93, 109.

"The rule for determining what effect "shall be given to such judgments is that "declared by this Court, in respect to the "faith and credit to be given to the judg- "ments of State Courts in the Courts of "other States, in the case of *M'Elmoyle* "vs. *Cohen*, 13 Pet., 312, 326, where it is "said: 'They are record evidence of a "'debt, or judgments of record, to be "'contested only in such way as judg- "'ments of record may be; and, con- "'sequently, are conclusive upon the de- "'fendant in every State, except for such "'causes as would be sufficient to set "'aside the judgment in the Courts of "'the State in which it was rendered.'"

There has for *ninety-eight years* been upon the Statute books of the United States

an Act of Congress, which as now codified in the Revised Statutes reads as follows:

"The writ of injunction shall not be "granted by any Court of the United "States to stay proceedings in any Court "of a State, except in cases where such "injunction may be authorized by any "law relating to proceedings in bank-"ruptcy."

(R. S., U. S., § 720.)

This is *at the least* as strong as the holdings of the United States Courts referred to.

Nevertheless, the United States Courts hold that they can enjoin parties to actions before them from proceeding in State Courts, and they do so enjoin them.

Here are some cases taken at haphazard: When it is *inequitable:*

Linton *vs.* Mosgrove, 14 Fed. Rep., 543.

When the Court has possession of the fund in controversy:

The Tolchester, 42 Fed. Rep., 180, 185.

Generally:

Dietsch *vs.* Hindekoper, 103 U. S., 494.

"If the bill is not maintainable, the ap-"pellees would find themselves in pre-"cisely the same plight as if the judg-"ment of the United States Circuit Court "in the replevin suit had been against "them instead of for them. The judg-

"ment in their favor would settle noth-
"ing. Instead of terminating the strife
"between them and their adversaries, *it*
"*would leave them under the necessity of*
"*engaging in a new conflict elsewhere.*
"*This would be contrary to the plainest*
"*principles of reason and justice,*"
p. 498.

French, trustee, *vs.* Hay, 22 Wall., 250.
B. & O. R. Co. *vs.* Ford, 35 Fed. Rep., 170.
Providence & N. Y. S. Co., 6 Ben., 124.
Long Island, &c., Transportation Co., 5 Fed. Rep., 599, 626.
The Amsterdam, 23 Fed. Rep., 112.
Murray *vs.* Overstotte, 8 Fed. Rep., 110.
Fisk *vs.* Union Pacific R.R. Co , 10 Blatch., 518, 520.

Marshall *vs.* Holmes, 141 U. S., 589.

"These authorities would seem to place
"beyond question the jurisdiction of the
"Circuit Court to take cognizance of the
"present suit, which is none the less an
"original, independent suit, because it
"relates to judgments obtained in the
"court of another jurisdiction. While it
"cannot require the State Court itself to
"set aside or vacate the judgments in
"question, it may as between the parties
"before it, if the facts justify such re-
"lief, adjudge that Mayer shall not enjoy
"the inequitable advantage obtained by
"his judgments. A decree to that effect
"would operate directly upon him, and
"*would not contravene that provision*
"*of the statute prohibiting a court of the*
"*United States from granting a writ of*

"*injunction to stay proceedings in a* "*State Court.* It would simply take from "him the benefit of judgments obtained "by fraud." *pp. 596–600.*

As the Act of Congress creating the Circuit Courts of the United States expressly says that their jurisdiction shall be "concurrent" with that of the Courts of the several States (~~R. S., §~~ ; 20 Stat. at Large, p. 434), these authorities are precisely in point.

f. The property in question was in the possession of the Court below (fol. 179). It was not in possession of the United States Court.

It was in the possession of the Court below, too, under an elder and a better title than that which was being adjudicated about in the United States Court. It could therefore never be got into the possession of the United States Court, and it was a necessity that the Court below should deal with it *completely.*

This somewhat extended statement of well-settled and elementary principles has been thought necessary, because Mr. Circuit Judge Wallace ordered his officer to proceed with the sale under the decree in the U. S. Court, after the judgment below had been rendered.

His opinion, which is reported in 49 Fed. Rep., is in the motion papers (fol. 268).

IV.

Certain other errors are assigned.

1. The injunction at folio 168 restraining all holders of certificates from bringing and proceeding with any action or proceeding to enforce any lien upon or in any way to affect the railroad.

   There are three answers to this:

   FIRST.—It does not present any Federal question.

   SECONDLY.—As the plaintiffs in error have sold all their interest in the premises, it is not any concern of theirs and they cannot raise the question.

   THIRDLY.—The provision is appropriate to the relief to be given and is usual and proper. The Court being about to sell the railroad, should give a clean title. And if there is in the books anywhere any case, the entanglements of which require the exercise of the extraordinary protective remedies of a Court of equity, it is submitted that it is this one.

2. The provision in the judgment at folio 182 directing the referee to ascertain who were the holders of the receiver's certificates and, with a view to that end, to take proofs.

   This provision was put in the judgment because the Court had adjudged that the portion of the purchase money which would go to the bonds whose owners had been concerned in the Sackett suit should be paid to the holders of the certificates. For this pur-

pose it was necessary to find out who they were.

The objection is that who they were had been conclusively determined in the Central Bank suit in the Circuit Court of the United States.

To this also there are several answers.

FIRST.—It is true that, three years before, the persons who then owned the certificates had been ascertained (fol. 126), but it does not follow that the ownership had continued the same. Possibly some of them had sold.

SECONDLY.—In no conceivable aspect can it present a Federal question.

THIRDLY.—As the ascertainment was solely for the purpose of the distribution of the proceeds to come from the sale of the railroad, and as the plaintiffs in error have sold out their interest in that railroad, they cannot raise the question.

FOURTHLY.—Without such a provision in it, the judgment would have been bad under the Constitution of New York.

3. The provision in the judgment at folio 131 directing the referee to ascertain who were the holders of the Lebanon Springs and Harlem Extension bonds and which of them were represented in Sackett's suit.

The answers given to the immediately preceding assignment will apply to this, with the further answer that, as the plaintiffs in error have never had any of such

bonds it is not easy to see how the question concerns them.

4. That the Court below erred in refusing to hold that the certificates were a first lien upon the railroad and that from any sale of the railroad the certificates should be first paid.

To this there are several answers.

FIRST.—As the plaintiffs in error have sold out whatever interest in the property the certificates had given them they cannot raise the question.

SECONDLY.—The question is not a Federal one.

THIRDLY.—From the facts found, which are not questioned by these assignments, the contrary conclusion and judgment inevitably follow.

The judgment of the Court of Appeals of New York should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

IN THE 1

Supreme Court of the United States,

No. 568 OF OCTOBER TERM, 1895.

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS and others,
Defendants in Error.

On Motion to Dismiss or Affirm.

2

SIRS:

You will take notice that upon the annexed printed portions of the record, and the other papers annexed, I will move the Supreme Court of the United States upon the sixth day of January, one thousand eight hundred and ninety-six, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to dismiss the writ of error in this action upon the ground that the case does not contain any Federal question, and that I will also at the same time and place and upon the same papers, move the Court that the judgment of the Court of Appeals be affirmed, because it is manifest that the writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further arguments. 3

That I will make such motions on the part of the following defendants in error: The Lebanon Springs Railroad, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas as trustee, and Ida S. Harrison.

New York, 11th of November, 1895.

Yours very truly,
EDWARD WINSLOW PAIGE,
Attorney for the said Defendants in Error.

To the Honorable
HENRY D. HYDE and
MATTHEW HALE,
Attorneys for the Plaintiffs in Error.

(*From the Record, at the end of it.*)

UNITED STATES OF AMERICA, ss.:

The President of the United States of America, to the Honorable the Judges of the Court of Appeals of the State of New York.

GREETING:—Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the State of New York, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglass as Trustee under the last will and testament of William Henry Douglass, deceased, and Ida S. Harrison plaintiffs and the Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler as receiver of the property of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert

impleaded with the Union Trust Company of New 7
York, James C. Hull, William Butler Duncan, John G. McCullough as administrator of the goods, chattels and credits of Trenor W. Park, deceased, The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfiled as receiver of the property of the New York, Boston and Montreal Railway Company, Marvin Sackett, Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and the 8
American Loan and Trust Company, and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing, John A. Nichols, Henry A. Tweed, as surviving Trustees of the creditors and stockholders of the New York Loan and Indemnity Company, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndike, William F. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting and Eustace C. Fitz, and William D. Shipman, as Assignee of William Butler Duncan defendants, wherein was drawn in question the 9
validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question, the validity of a statute of, or the authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or

10 commission specially set up or claimed under such clause of the said constitution, treaty, statute or commission; manifest error hath happened to the great damage of the said The Central Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert as by their Complaint appears. We being willing that error, if any hath happened, should be duly corrected,
11 and full and speedy justice be done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, that all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right, and according to the laws and
12 custom of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States in and for the Northern District of New York.

Allowed by

CHAS. ANDREWS, Ch. Judge Ct. of Appeals of State of New York.

(*From the Record, fol. 2624 of Printed Book.*) 13

SUPREME COURT.

TRIAL DESIRED IN RENSSELAER COUNTY.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

against

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York,

Defendants. 14

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty 15 days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated April 9, 1886.

HALE & BULKELEY,
Plaintiff's Attorneys,
Office and Post-office address,
25 North Pearl Street,
Albany, N. Y.

16 (*From the Record, fol. 2629 of Printed Book.*)

SUPREME COURT,

COUNTY OF RENSSELAER.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

against

17 ROWLAND N. HAZARD, William Foster, Jr., the New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York.

The complaint of the above-named plaintiff respectfully shows:

I.—That the plaintiff is a banking association duly organized and incorporated under the Laws
18 of the United States, located and doing business in the City of Boston, in the Commonwealth of Massachusetts.

II.—Plaintiff alleges, upon information and belief, that on or about the 2d day of April, 1881, in an action in this court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, upon the petition of one John W. Van Valkenburgh, who had theretofore been appointed in said action as receiver of the Lebanon Springs Railroad Company, an order was duly made at a Special Term of this court, bearing date the said 2d day of April, 1881, and duly en-

tered in the office of the clerk of the county of Rensselaer, whereby the said John W. Van Valkenburgh, as receiver as aforesaid, was authorized and directed to issue, under his hand, receiver's certificate of indebtedness dated April 2, 1881, with interest at six per cent. of five hundred dollars each payable in five years, with interest coupons thereto attached payable on the first day of January and July in each year, in the aggregate amount of three hundred and fifty thousand dollars. Said certificates to be signed by said Van Valkenburgh as such receiver, consecutively numbered fr[illegible] one to seven hundred, inclusive, and a certificate on each thereof duly signed by one of the officers of the Farmers' Loan and Trust Company of New York City; that said certificates are of the series included in the numbers and amount aforesaid; that said certificates and the interest coupons thereto attached be made payable at said Farmers' Loan and Trust Company in said City of New York. And whereby it was further ordered that said receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon, pay and discharge certain previous certificates theretofore authorized by order of this court, and from the moneys arising from said certificates the said receiver was also empowered and directed by said order to purchase all necessary materials for the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found to be due to claimants by the referee in said order named; and by said order it was further provided, directed and decreed, that said receiver's certificate of indebtedness, to the amount therein directed to be issued, be and the

22 same were thereby declared to be a debt of the Receiver incurred for the benefit and protection of the said Lebanon Springs Railroad, and its owners and bondholders thereof, and said certificates to the said amount of three hundred and fifty thousand dollars were, by said order, declared and decreed to be a first lien on said railroad bed, track, ties, trestles, bridges, culverts, engines, cars, depots, and all and every kind of property, either owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any reorganization of the company, or in its consolidation with any
23 other company, and that in case of any sale of the said railroad, the property in the hands of the receiver and franchises under any decree of the Supreme Court, said certificates were to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and canceled by him from the earnings of said railroad. But it was further provided in said order that in case the said railroad property in the hands of the receiver, and franchises on any sale thereof, should not bring sufficient to pay the full amount of principal and interest then due on the outstanding negotiated
24 certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver and franchises should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid, with interest thereon, as by reference to said original order, or the record thereof, as entered in the County of Rensselaer, will more fully appear.

III.—And plaintiff further alleges, upon information and belief, that the said John W. Van Valkenburgh as receiver as aforesaid, under and in pur-

suance of said order, did duly issue and negotiate 25
certificates of indebtedness in the manner and form by said order provided, to the said amount of three hundred and fifty thousand dollars. And that he duly applied the moneys received from the said certificates to the uses and purposes in the said order mentioned and authorized.

IV.—And the plaintiff further alleges that it is now, and has for several years last past been, the holder and owner of said certificates, amounting in the aggregate to two hundred and fifty thousand dollars of principal thereof.

26

V.—And the plaintiff further alleges, upon information and belief, that the certificates of indebtedness issued and negotiated by said receiver, which are not held by this plaintiff, are held by divers persons and corporations, many of whose names are unknown to this plaintiff.

VI.—And the plaintiff further says, upon information and belief, that in the said above-entitled action, wherein Marvin Sackett was plaintiff and Russell C. Root and others were defendants, upon the trial of the issues therein this plaintiff appeared 27
by its attorneys and counsel and made proof in regard to the issuing of said receiver's certificates and its title thereto, and that such proceedings were had in said action; that on or about the 12th day of January, 1885, a judgment was duly rendered therein by which it was, among other things, adjudged and decreed that the said certificates of indebtedness, issued by the said John W. Van Valkenburgh as receiver as aforesaid, under and by virtue of the above-mentioned order, amounting in the aggregate to three hundred and fifty thousand dollars, were ratified and

confirmed and declared to be a first lien on the said railroad and its property, as provided in and by the said above-mentioned order, and as stated in said certificates, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in the said judgment provided for; and whereby it was further adjudged and decreed that the property, franchises and rights of the Lebanon Springs Railroad Company, as described in and enumerated in a certain mortgage made by said company to the Union Trust Company of New York, and as in the said judgment particularly described and set forth, and all the right, title and interest of any and of all the parties to said action therein and thereto, including all property and assets in the hands of the receiver in said action appertaining thereto, wherever the same might be, be sold at public auction in the county of Rensselaer by George McClellan, Esq., of Chatham, Columbia County, New York, Referee appointed in and by said judgment to make such sale for the benefit of the first mortgage bondholders of the said railroad company issued July 1, 1867, for the amount of two millions of dollars, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and that said purchaser or purchasers should assume, as part of the consideration of the said purchase, the payment thereof as above stated, and that from the avails of said sale, after the payment of certain other expenses therein provided for, the said referee pay the amount of interest due on said receiver's certificates, as by reference to the said judgment, which was duly entered in the office of

the clerk of the County of Rensselaer, will more 31
fully appear.

VII.—That under and in pursuance of said judgment the said George McClellan, the referee therein named, did duly advertise for sale on the 12th day of June, 1885, and did sell at public auction the premises, rights, franchises and property in the said judgment mentioned and described, and the above-named defendants, William Foster, Jr., and Rowland N. Hazard, became the purchasers thereof for the price or sum of one hundred and fifty-five thousand dollars, that being the highest sum bid therefor; and the said defendant William 32
Foster, Jr., acting on behalf of himself and the said defendant Rowland N. Hazard, did then and there, by his duly authorized attorney, pay to said referee five per cent. of said purchase price, and did, by said attorney, subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did, for himself and said Hazard, assume and agree to pay the amount of unpaid principal and interest on said certificate of indebtedness, as part of the consideration of such purchase. And the balance of said sum of one hundred and fifty-five thousand dollars was thereafter, as plaintiff is 33
informed and believes, paid by the said purchasers to the said referee, and the said referee did thereafter duly execute and deliver to the said defendants, William Foster, Jr., and Rowland N. Hazard, a deed of the said premises and property in said judgment described. And the said referee paid from said sum of one hundred and fifty-five thousand dollars the interest then due on said certificates, amounting to about sixty thousand dollars.

VIII.—That the said referee's deed above mentioned was, as this plaintiff is informed and believes,

34 accepted by said defendants, William Foster, Jr., and Rowland N. Hazard, and was by them delivered to the clerk of the County of Rensselaer for record, and was duly recorded in the office of the said clerk of Rensselaer County, in Book 212 of Deeds, page 406. That in and by the said deed the grantees therein, the said defendants, Hazard and Foster, took said premises and property subject to the said unpaid principal and interest on the said receiver's certificates, as required by the said judgment as aforesaid.

35 IX.—And plaintiff further says that the principal of said certificates, with interest from the 1st day of January, 1886, became due and payable upon the 2d day of April, 1886. That on that day the said certificates, amounting to two hundred and fifty thousand dollars, held by this plaintiff as aforesaid, were duly presented to the Farmers' Loan and Trust Company of the City of New York, where the same were payable, and payment thereof was demanded, but the same was refused, and the whole of the said principal, with interest from the 1st day of January, 1886, is now due and unpaid.

36 X.—That the said railroad premises mentioned in the said judgment and in the said referee's deed are described as follows: The following is a description of said premises and property as contained in the mortgage made by the Lebanon Spring Railroad Company to the Union Trust Company, the interest of the parties to this action and of the bondholders of the said Lebanon Springs Railroad Company, in which it is directed to be sold:

"All the right, title and interest of the said party of the first part (said railroad company) of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of

the first part, from the Chatham Four Corners, in 37
the county of Columbia, to the east line of the state
of New York, in the town of Hoosick, in the county
of Rensselaer and all lands thereafter to be
acquired for the purpose of forming said track or
railway; also, the railroad of the said party of the
first part, now built and to be built, and all the
rails, bridges, fences, stations, station-houses,
wood-houses, buildings and other structures and
appurtenances thereunto belonging, and also all the
tolls, incomes, rents, issues and profits and alienable
franchise of the said party of the first part, con-
nected with said lway or relating thereto, includ-
ing its rights and anchises as a corporation; and 38
also all the rol. .g stock, locomotives, tenders,
snow ploughs and scrapers and all the passenger
cars, baggage, mail and express cars, freight, stock,
and dumping cars, flat cars, and cars of every de-
scription; all the machine shops and blacksmith
shops and all the articles used in the construction,
replacing and repairing of roads and cars, and in the
running of the cars now owned or hereafter to be
acquired by the said party of the first part, all of
which chattels are declared to be fixtures and
appurtenances to said railroad and are to be and be
sold therewith and not separate therefrom and to be 39
taken as a part thereof; and also all the right, title
and interest which the said party of the first part
may have or may hereafter acquire of, in and to the
Vermont and New York Railroad, constructed or to
be constructed from the terminus of the railroad of
the party of the first part in the town of Hoosick
aforesaid, to the village of Bennington, in the
State of Vermont, including all the right, title and
interest of the party of the first part, of, in and to
the franchise and equipment of the said Vermont
and New York Railroad belonging or in any wise

40 appertaining, or which may at any time belong or appertain to the same, as well in law as inequity."

XI.—That, as plaintiff is informed and believes, the defendants, or one or some of them, are now in possession of the premises and property above described and are using and operating the same for railroad purposes, and that all the said defendants have, or claim to have, some interest in or a lien upon the said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said certificates.

41

XII.—That there is now justly due this plaintiff, upon the said certificates held by it, the said sum of two hundred and fifty thousand dollars, with interest thereon from the 1st day of January, 1886.

Wherefore, the plaintiff prays that the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon the above described premises in the hands of the purchasers thereof, and of any persons claiming through or under the purchasers at said referee's sale, and that the defendants and all persons claiming under them, or either of them, subsequent to the com-
42 mencement of this action, may be barred and foreclosed of all right, claim or lien and equity of redemption in the said premises; that a receiver of the said premises, to receive the rents and profits thereof pending this suit for the benefit of the plaintiff and the other holders of said certificates, may be appointed by order of this court; that the said premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff and to the other holders of said certificates for principal and interest and costs, and which may be sold separately without material injury to the parties interested, may be decreed to be sold according to law;

that out of the moneys arising from the sale thereof, 43
the plaintiff and other holders of said certificates, who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates, with interest to the time of such payment, and the costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Rowland N. Hazard and William Foster, Jr., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto, and that the plaintiff, in behalf of itself and the other ceriificate holders as aforesaid, may have such further or 44
other relief in the premises as shall seem to the court just and equitable.

HALE & BULKELEY,
Plaintiff's Attorneys,
25 North Pearl Street,
Albany, N. Y.

STATE OF NEW YORK,
City and County of Albany, } ss.:

HENRY D. HYDE, being duly sworn, deposes and says that he is one of the directors of the plaintiff 45
in this action; that he had read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY D. HYDE.

Sworn to before me this 9th day of April, 1886.

WM. JOHNSON,
Notary Public,
Albany County, N. Y.

46 (*From the Record—Fol. 2676 of printed book.*)

N. Y. SUPREME COURT,

COUNTY OF RENSSELAER.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

47 *against*

ROWLAND N. HAZARD, William Foster, Jr., and The New York, Rutland and Montreal Railroad Company, and The American Loan and Trust Company of New York,

Defendants.

The defendants Rowland N. Hazard and William Foster, Jr., for their separate answer to the plain-
48 tiff's complaint herein:

I.—Deny any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the complaint marked respectively I, II, III, IV and V.

II.—And answering the paragraph or subdivision of the plaintiff's complaint marked VI, the defendants admit and aver that upon the trial of said action, wherein Marvin Sackett was plaintiff and Russell C. Root and others defendants, this plaintiff appeared by its attorneys and counsel and

made some proof in regard to the said receiver's 49
certificates, and that the judgment, which was duly rendered in said last-mentioned action, among other things provided that the property and franchise of the Lebanon Springs Railroad Company, as enumerated and described in the mortgage made by said company to the Union Trust Company, be sold at public auction in the County of Rensselaer, by George McClellan, Esq., referee, Columbia County, the referee appointed in and by said judgment to make such sale; but these defendants deny any knowledge or information thereof sufficient to form a belief as to the other allegations 50
contained in the said paragraph or subdivision of the complaint marked VI.

III.—And answering the paragraph or subdivision of the complaint marked VII, these defendants admit that in pursuance of said judgment the said George McClellan, as such referee, did duly advertise the said property and franchise of the Lebanon Springs Railroad Company for sale, on or about the 28th June, 1885, and did subsequently sell the same at public auction to these defendants, who became the purchasers thereof for the price of $155,000, and that these defendants did then and 51
there, by their duly authorized attorney, subscribe to a certain contract of sale, which was also signed by said referee; but these defendants expressly deny that the contents of said contract are correctly set forth in the plaintiff's complaint herein, and that they did, by said contract or otherwise, assume and agree to pay to the plaintiff the amount of unpaid principal and interest on the receiver's certificates held by this plaintiff.

IV.—And answering the paragraph or subdivision of the complaint marked VIII, the defendants admit the same.

52 V.—And answering the paragraph or subdivision of the complaint marked IX, the defendants deny any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained.

VI.—And answering the paragraph or subdivision of the complaint marked X, these defendants aver, upon information and belief, that the description therein contained of the premises conveyed by the referee's deed is correct.

VII.—And further answering, these defendants
53 deny each and every allegation of the complaint not hereinbefore expressly admitted or denied.

VIII.—And for a separate and distinct answer to the plaintiff's complaint herein, these defendants aver that they acquired the said property mentioned in the plaintiff's complaint, with notice that the receiver's certificates were outstanding and of the sum justly due therefor; and these defendants have ever since been and now are ready and willing to pay the sum justly due on account of the said receiver's certificates
54 to the persons lawfully entitled thereto, but these defendants are advised and believe that this plaintiff is not entitled to receive payment thereof. That when the said property came into the hands of these defendants, as aforesaid, it was subject to a lien for the amount actually due from the said receiver, Van Valkenburg, and his successor, in the trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants, when they acquired the aforesaid estate and property, succeeded to all the rights of the prior owners of said property as well as to their obligations; and that in case it be held that the lien

against said property is enforceable in this action against the property after the discharge of the receiver, that then these defendants ought to be permitted to assert the rights and equities of those with whom these defendants are privy in estate. 55

That in accepting the deed of the premises aforesaid, these defendants intended only to obligate themselves to pay the amount actually due the receiver on account of said certificates, with proper interest, and no other or greater sum by way of profit, and these defendants aver that they incurred no greater or other obligation in the premises.

Wherefore, these defendants ask judgment that the complaint be either dismissed, with costs, or that an accounting be had in the premises to determine what, if any, liens are on the property aforesaid, and in whose favor, so that the defendants may be fully assured and protected for any payments for or on account of said receiver's certificates. 56

VANDERPOEL, GREEN & CUMING,
Attorneys for Defendants
Hazard and Foster,
No. 2 Wall Street,
New York City.

City and County of New York, ss.:

ROWLAND N. HAZARD and WILLIAM FOSTER, JR., being severally duly sworn, each for himself, says that he is one of the defendants herein; that he has read the foregoing answer and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 57

R. N. HAZARD,
WM. FOSTER, JR.

Sworn to before me this 7th day of June, 1886.

F. SPECHT, Notary Public,
Kings and New York Counties, N. Y.

58 (*From the Record, fol. 2696 of printed book.*)

SUPREME COURT.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

against

59 THE NEW YORK, RUTLAND AND MONTREAL RAILWAY COMPANY, impleaded with others,

Defendant.

The New York, Rutland and Montreal Railway Company, by Robert Ludlow Fowler, its attorney, makes answer to the complaint herein as follows:

I.—It denies any knowledge sufficient to form a belief concerning the allegations contained in paragraphs numbered I and II of the complaint, excepting that it admits that by a certain order of the
60 said Supreme Court, John W. Van Valkenburgh was duly authorized and empowered to issue and emit receiver's certificates in the aggregate amount of $350,000, but for greater certainty this defendant asks leave to refer on the trial hereof to the original of the order in question, and to the terms, limitations and conditions of such order and emission.

II.—This defendant denies the allegations contained in paragraphs III and IV of the complaint, excepting as hereinafter qualified and controverted.

III.—This defendant alleges that in respect of the

certificates referred to in paragraph V of the com- 61
plaint, the holders thereof do not and cannot unite with plaintiff in this action, nor are they represented by plaintiff bank, nor has plaintiff bank any power or authority to represent such holders in this action, but it sues for itself alone.

IV.—This defendant further answering, saith that in respect of the action referred to in paragraph VI of the complaint, it is informed and believes that plaintiff was not bound by any decree therein as it was not a party thereto, and no proofs were 62
ever taken therein in any way affecting or determining plaintiff's rights against the property or fund referred to in the complaint.

Defendant admits that by such decree certain certificates issued by John W. Van Valkenburg, receiver, were declared to be, as hereinafter alleged, a first lien on the railroad and property referred to in the complaint herein. But defendant denies any knowledge sufficient to form a belief whether the certificates now claimed to be held by this plaintiff are any portion of such certificates so declared to be a lien, as aforesaid, or whether such declaration constitutes a valid and subsisting lien in favor of this plaintiff bank, enforceable in this action 63
against this defendant or its property.

V.—This defendant further answering, admits the allegations of the complaint contained in paragraph VII of the complaint, excepting that defendant denies that defendants Hazard and Foster ever agreed to pay in excess of the $155,000 (actually paid by them) more than was justly due by the receiver aforesaid on his certificates, nor did said Hazard and Foster acquire the property described in the complaint, subject to a lien for a sum greater than that justly due and owing to the *bona fide*

64 first takers of the receiver's certificates aforesaid, and this defendant alleges that the amount justly due by such receiver on such certificates has never been ascertained by any judicial inquiry, binding on any person soever, and particularly this defendant. Nor has it ever been ascertained who were the *bona fide* first takers for value of such receiver's certificates.

VI.—And this defendant further answering, admits the allegations contained in paragraph VIII of the complaint, except that it denies that by the
65 terms of the conveyance the defendants Foster and Hazard, or either of them, took the property referred to in the complaint subject to a lien for a sum greater than that justly due by the receiver aforesaid to the original and *bona fide* holders of the certificates issued and emitted by him.

VII.—This defendant denies the allegations contained in paragraph XII of the complaint.

VIII.—And for a further and separate defense to the complaint, this defendant alleges upon information and belief that heretofore, to wit, on the 2d
66 day of April, 1881, in an action in the Supreme Court of the State of New York, in which Marvin Sackett, on behalf of himself and all others similarly situated, was plaintiff, and Russell C. Root and others were defendants, the said Supreme Court authorized one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, to issue and emit receiver's certificates amounting in the aggregate to the par value of $350,000, and bearing interest at and after the rate of six per cent. per annum, but said Van Valkenburgh was ordered by said Court to negotiate said certificates for par, and not otherwise as by a limitation contained on

the face of the said order, this defendant believes and charges, does appear. 67

That said Van Valkenburgh, receiver, in violation of the terms of the said order, issued 500 of said certificates, of the par value of $500 each, to one Edward Crane, as his agent, and without any consideration. And said Crane then pledged or hypothecated such 500 certificates with the Pacific National Bank of Boston, to secure a loan made by such Pacific National Bank to said Crane. That subsequently said Crane is said to have paid over to said receiver a portion of the sums thus realized by him, but said property described in the complaint became liable, by reason thereof, only for 68 the sums actually so received by its receiver in the aggregate, a sum greatly less than the face of said certificates.

And defendant further shows and alleges, that these said certificates so issued to Crane, as aforesaid, may be those now claimed to have passed to this plaintiff, at or about the time when said Pacific National Bank became grossly insolvent. And this defendant alleges that if they have so passed to the plaintiff bank, it is as collateral for some debt or claim due to such plaintiff by said insolvent Pacific National Bank, or by said Crane, or by some other 69 intermediary, and not for value then or ever paid by the plaintiff bank; and so it is the plaintiff can, in any event, have no rights in respect thereof superior to those of said Paciffc National Bank, or the said Crane, or the first holder thereof.

And defendant alleges, that such certificates, by the law in that behalf made and provided, were not negotiable nor assignable, excepting subject to all equities and to the extent of the amount actually due by the said receiver to said first holder, or to said Pacific National Bank, or to said Crane, and if any of such certificates passed to the plaintiff they

70 so passed subject to all the equities existing in favor of said receiver, whatever they may have been. And this defendant admits, that all said certificates issued by said receiver were a charge on all the property in the hands of said receiver, for the amount actually paid for such certificates or advanced thereon by the said first holder; with lawful interest at six per cent. on the sums so advanced from the date of the advance, but for no more than the sum so paid, with proper interest thereon.

That subsequent to such omission aforesaid, said Van Valkenburgh was discharged from his said
71 receivership and was succeeded by one William V. Reynolds, who acquired said property subject to the lien of the said receiver's certificates as aforesaid. That subsequently thereto such proceedings were had, that the said property described in the complaint in the said action of Sackett against Root and others was regularly brought to a judicial sale by virtue of a judgment and decree of said Supreme Court in said action made and entered, and it was then purchased in by the defendants Hazard and Foster.

That subsequent thereto the said Hazard and
72 Foster conveyed and transferred all the said property and franchises precisely as conveyed to them by George McClellan, Esquire (a referee thereunto duly empowered), to this answering defendant, subject, however, to the payment of the sum justly due by said receivers, but subject to no greater sum than that due by said receivers to the first holder or holders of the said certificates.

That this defendant so acquired the said property with notice of the said receiver's certificates outstanding and of all the premises relating to the sums justly due by the said receivers, and defendant has ever since been and now is ready and will-

ing to pay the sums, justly due by the said receiv- 73
ers to the persons lawfully thereunto entitled, but this defendant is advised and charges that this plaintiff is not entitled to receive payment thereof, whoever else may be.

That as this answering defendant is advised, believes and therefore charges, the said property coming into the hands of this defendant as aforesaid is subject to a lien for the amount actually due from the said receiver, Van Valkenburgh, or his successor in the trust on such receiver's certificates but for no other or greater amount, and that this defendant, when it acquired the aforesaid estate and 74
property, succeeded to all the rights of the prior owners of said property, as well as to their obligations, and that in case it be held that a lien against said property be enforceable by this action against the property after the discharge of such receivers, that then this defendant ought to be permitted to assert the rights and equities of those with whom this defendant is in privy in estate.

And for further answer this defendant avers that in accepting the deed of the premises aforesaid from Hazard and Foster, this defendant intended only to pay the amount actually due from the receiver on the said certificates 75
proper interest, and no greater or other sums by way of profit, and said Hazard and Foster incurred no greater obligation in the premises.

That this defendant acquired said property subject to no greater lien in favor of any holder of receiver's certificates than existed against the property in the hands of the receiver, and that amount, when fixed and determined judicially in favor of a definite person, this defendant stands ready and offers to pay to the persons so justly and legally entitled.

That the defendant has, since its purchase afore-

said, expended large sums of money in betterments of the property so purchased, and is daily improving the same and increasing its value. That all the receipts, in excess of actual running expenses, are also being applied in good faith to betterments and improvements on the said railway, and the said property is now worth very much more than when defendants acquired it, and contracts are outstanding and being executed whereby much more will be expended by defendant on said property within the next four calendar months.

Wherefore this defendant asks judgment that the complaint be either dismissed with costs or else that an accounting be had in the premises to determine what amounts are a lien on the property aforesaid and in whose favor, so that the defendant may be fully assured and protected in any payments for account of its shareholders or other persons in interest.

ROBERT LUDLOW FOWLER,
Defendant's Attorney,
6 Wall Street, New York City.

City and County of New York, ss.:

FRANCIS A. WHITE, being duly sworn, says that he is the president of the New York, Rutland and Montreal Railway Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANCIS A. WHITE.

Sworn to before me this 18th day of May, 1886.

CHARLES JANLE,
Commissioner of Deeds,
New York County.

(*From the Record, fol. 2729 of printed book.*) 79

SUPREME COURT.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues, etc.,

against

THE AMERICAN LOAN AND TRUST COMPANY, impleaded with ROWLAND N. HAZARD and others.

80

The defendant, the American Loan and Trust Company, appearing in this action by Blair & Rudd, its attorneys, answers the plaintiff's complaint as follows:

FIRST.—This defendant avers, upon information and belief, that subsequently to the sale of the railroad described in the complaint to the defendants, William Foster, Jr., and Rowland N. Hazard, as in the complaint alleged, the said Foster and Hazard duly sold and conveyed the said railroad to the defendant, the New York, Rutland and Montreal Railway Company, which entered into possession thereof and has ever since continued in such possession. 81

SECOND.—That thereafter, and in or about the month of July, 1885, the said defendant, the New York, Rutland and Montreal Railway Company, duly executed and delivered to this defendant, as trustee, a certain indenture of mortgage or deed of trust, whereby, for the purpose of securing the payment of the principal and interest of certain bonds in said mortgage or deed of trust described, it granted, bargained, sold and conveyed to this

82 defendant, as trustee, besides other property, the said railroad mentioned and described in the complaint herein, in trust for the equal *pro rata* use, benefit and security of all persons and corporations that should at any time become or be the lawful owners or holders of any of said bonds, and this defendant accepted the said mortgage or deed of trust and undertook to perform the trust created thereby.

THIRD.—That thereafter, and before the commencement of this action, as the defendant is informed and believes, bonds secured by said mort-
83 gage or deed of trust, or intended so to be, to the amount of $1,400,000 or thereabouts had been actually and in good faith issued and negotiated, which bonds are, as this defendant is informed and believes, now held by *bona fide* purchasers thereof.

FOURTH.—That the holders of a large majority of said bonds have requested this defendant to appear in this action in the interest of all the holders of said bonds, and, as their trustee, to claim and demand the right, as a junior lienor, to be subrogated to the rights of the holders of all of the
84 now outstanding receiver's certificates mentioned in the complaint herein, upon such terms as to this Court shall seem meet and just, and have promised and agreed to provide and furnish to this defendant, upon demand, the means with which to pay such sum or sums of money as this Court shall decree to be paid to the holder or holders of said receiver's certificates.

FIFTH.—That this defendant has no knowledge nor information sufficient to form a belief as to, nor any sources of information from which it can ascertain, the amount of the said receiver's certificates

now outstanding, in the hands of the plaintiff, and 85
the other parties in whose behalf this suit is brought,
or in the hands of any of them, or the amount of
the principal and interest now due thereon, and is
therefore unable to make a tender to the plaintiffs
and such other holders of said certificates, of the
several sums which they may severally be entitled
to receive thereon; and this defendant is advised
and believes that it is entitled to ask that the said
sums may be determined by the judgment and de-
cree of this Court, to the end that this defendant,
on behalf of the said holders of said bonds, may
have an opportunity to pay to the plaintiffs and
the holders of said certificates the sums severally 86
due thereon, and to be subrogated to their rights
under said certificates.

Wherefore, this defendant prays that the several amounts due to the plaintiffs and the other holders of the receiver's certificates mentioned in the complaint, may be ascertained, determined and established by the decree of this Court, and that this defendant may have an opportunity to pay the several sums so ascertained and established, and that the plaintiffs and such other holders may be decreed and directed upon receiving payment as aforesaid to transfer and deliver all of the said cer- 87
tificates so held by them as aforesaid to this defendant, and that this defendant may have such other or further relief in the premises as to the Court shall seem meet.

BLAIR & RUDD,
Attorneys for Defendant,
American Loan and Trust Company,
102 Broadway, N. Y.

88 City and County of New York, ss.:

WILLIAM D. SNOW, being duly sworn, says: I am the secretary of the American Loan and Trust Company, the defendant avove named; I have read the foregoing answer and know the contents thereof, and the same is true of my ow.. knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

(Signed) W. D. SNOW.

Sworn to before me
89 May 29, 1886.

H. E. DOREMUS,
Notary Public,
Kings County.

Certificate filed in New York County.

90

(*From the Record, folio 2746 of printed book.*) 91

SUPREME COURT.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

against

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company,

Defendants. 92

To the Honorable the Supreme Court of the State of New York:

Your petitioners, Rowland N. Hazard, William Foster, Jr., the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company, defendants in the above-entitled suit, present this their petition for the removal of this suit or controversy to the Circuit Court of the United States for the Northern District of New York, and respectfully show to this Honorable Court as follows: 93

I.—That this suit was begun by the service of a summons only, entitled in this court, and by leaving the same with your petitioner, Rowland N. Hazard, on or about the 8th day of April, 1886, and with your petitioner, William Foster, Jr., on or about the 8th day of April, 1886, and with your

94 petitioner, the New York, Rutland and Montreal Railway Company, on or about the 9th day of April, 1886, and with your petitioner, the American Loan and Trust Company, on or about the 10th day of April, 1886, and your said petitioners have since duly appeared, to wit: Rowland N. Hazard and William Foster, Jr., by Vanderpoel, Green & Cuming, as their attorneys of record, on the 26th day of April, 1886, and the New York, Rutland and Montreal Railway Company by Robert Ludlow Fowler, its attorney of record, on the 10th day of April, 1886; and the American Loan and Trust Company, by
95 Blair & Rudd, its attorneys of record, on the 12th day of April, 1886.

That thereafter, to wit, a copy of the complaint herein was served on the various attorneys of record, but no other proceedings have been had on the part of your petitioners in this action, excepting that the defendant company's time to plead to the complaint has been enlarged and the defendants have answered, the last answer being served on the 9th day of June, 1880, and no term of this court has at any time heretofore been held at which this cause be first tried. That such term will not be held in the ordinary course until the fourth Monday of
96 September next hereafter, as your petitioners are informed and believe.

II.—That the plaintiff is and so was, at the time this suit was begun, a citizen of the State of Massachusetts, that is to say, a banking corporation located in the State of Massachusetts, and having its principal office and place of business in the City of Boston in said State.

That the petitioners, Rowland N. Hazard, and William Foster, Jr., are severally and so were, at the time this suit was begun, citizens of the State of New York, residing in the City of New York.

That the petitioner, the New York, Rutland and 97
Montreal Railway Company, at the time of the commencement of this suit, and ever was, and now is, a citizen of the State of New York, to wit, a corporation duly formed, organized and existing under and by virtue of the Laws of New York.

That the petitioner, The American Loan and Trust Company, at the time of the commencement of this suit, and ever was, and now is, a citizen of the State of New York, to wit, a corporation created, organized and existing under and by virtue of the Laws of the State of New York.

III.—Your petitioners further show that this is a 98
suit of a civil nature in equity, now pending in equity, now pending in this aforesaid Supreme Court of the State of New York, and that the matter in dispute exceeds, exclusive of costs, the sum or value of $500, in which there is a controversy wholly between citizens of different States, to wit, wholly between the plaintiff, a citizen of Massachusetts; and the defendants, citizens of New York, as more precisely hereinbefore alleged.

IV.—Your petitioners further show that they desire to remove this suit from this said State Court 99
to the next Circuit Court of the United States for the Northern District of New York, pursuant to the law in that behalf, and do now before the term of this court, at which the said cause could be first tried, and before the trial hereof, make and file herewith a bond with good and sufficient surety for their entering in such Circuit Court, on the first day of its now next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and also for their appearing and entering

special bail in this suit, if special bail was originally requisite or required therein.

Wherefore, your petitioners pray this Honorable Court to accept this, their petition and the said surety or bond, and to proceed no further in this suit.

Dated New York, September 17, 1886.

R. N. HAZARD.
WM. FOSTER, JR.

NEW YORK, RUTLAND AND MONTREAL RAILWAY COMPANY.

[L. S.] By F. A. WHITE,
President.

Attest: WM. P. WATSON, Secretary.

AMERICAN LOAN AND TRUST COMPANY.

[L. S.] By R. N. HAZARD,
President.

Attest: W. D. SNOW, Secretary.

ROBERT LUDLOW FOWLER,
Of Counsel for Petitioners.

STATE OF NEW YORK, }
City and County of New York, } ss.:

FRANCIS A. WHITE, being duly sworn, says that he is the president of the petitioner and defendant, the New York, Rutland and Montreal Railway Company, and that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANCIS A. WHITE.

Sworn to before me this 18th day of September, 1886.

W. F. CHITTENDEN,
Notary Public, Kings County.
Certificate filed in New York County.

UNITED STATES CIRCUIT COURT, 103

NORTHERN DISTRICT OF NEW YORK.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

against

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York.

In Equity. 104

This cause having been commenced in the Supreme Court of the State of New York, and having been removed into the Circuit Court of the United States for the Northern District of New York, upon the petition of the defendants Rowland N. Hazard, William Foster, Jr., the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company of New York, and the record of the proceedings in said cause in the said Supreme Court of the State of New York, and upon such removal having been filed in this court, and the said defendants Rowland N. Hazard, William Foster, Jr., the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company of New York having entered their appearance in this cause in this court, 105

It is now, on motion of Robert Ludlow Fowler, attorney and solicitor for the said defendant, the

106 New York, Rutland and Montreal Railway Company,

Ordered, that this cause do now proceed in this court in the same manner as if it had been originally commenced therein.

Dated September 23, 1886.

(*From the Record, folio 163 of printed book.*)

At a Special Term of the Circuit Court of the United States in Equity sitting,
107 held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the City of Syracuse, on the 24th day of March, 1887.

Present—Hon. WILLIAM J. WALLACE,
Circuit Judge.

THE CENTRAL NATIONAL BANK OF Boston, which sues as well for itself as for all others similarly
108 situated,

vs.

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew Hale, of counsel for complainant, and by

Messrs. Robert Ludlow Fowler and Thomas G. 109
Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as Receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2d day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the 110
bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant The Central National Bank of Boston is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000, of principal thereof, upon which there is now due and unpaid to the complain- 111
ant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon, from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the City of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is herehy authorized and directed to give notice by advertising in two daily newspapers published in the City of Albany in said District, re-

112 quiring the holders of said certificates to produce the same before the said master at his office in the City of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

That the premises and property described in the
113 bill of complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the County of Rensselaer in said District by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a Referee for said purpose; that the said Referee give public notice of the time and place of such sale according to law and the practice of this Court; that the complainant or any other party to this suit may become a pur-
114 chaser on such sale; that the said Referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said Referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid; together with interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other of said certificates respectively the amount of principal and interest

due thereon, as the same may be found and re- 115
ported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said Referee pay and distribute the said moneys after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said Referee bring the surplus moneys arising from the said sale, if 116
any there shall be, into court within twenty days after the same be received, to be there subject to the order of the Court; that the said Referee make a report of such sale, and file the same with the Clerk of this Court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amaunt due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said Referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and William 117
Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said Referee's deed and a certified copy of the order or decree confirming the said Referee's report of sale.

118 And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and hereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the
119 deed executed by George McClellan, Referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein:

"All the right, title and interest of the said party of the first part (said Lebanon Springs Railroad Company) of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part, from the Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in the Town of Hoosick, in the County of Rensselaer, and all lands thereafter to be acquired for the purpose of forming
120 said track or roadway; also the railroad of the said party of the first part, now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part, connected with said railroad or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow ploughs and scrapers, and all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every

description; all the machine shops and blacksmith 121
shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith, and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York Railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the 122
Town of Hoosick aforesaid, to the Village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York Railroad belonging or in any wise appertaining, or which may at any time belong or appertain to the same, as well in law as in equity."

Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a Receiver to take immedi- 123
ate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a Referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by Receivers in such cases.

WM. J. WALLACE.

124 (*From the Record, folio 2772 of printed book.*)

UNITED STATES CIRCUIT COURT,

NORTHERN DISTRICT OF NEW YORK.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

against

125 ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York.

To the Circuit Court of the United States in and for the Northern District of New York, in equity sitting.

126 I, the undersigned, duly appointed by a decree made and entered in the above-entitled cause, at a Special Term of the said Court, held at the Chambers of the Circuit Judge, in the City of Syracuse, on the 24th day of March, 1887, master *pro hac vice* in said cause, and to whom it was referred by said decree to examine, ascertain and report who are the holders other than the complainant of the certificates of indebtedness issued by John W. Van Valkenburg, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2d day of April, 1881,

made in an action in said Supreme Court, wherein 127
one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, and how much remains due and unpaid thereon, do hereby respectfully report:

FIRST.—That in pursuance of the directions contained in said decree, I gave notice by advertising in two daily newspapers, to wit, the *Argus* and the *Albany Evening Journal*, published in the City of Albany, in said district, requiring the holders of said certificates to produce the same before me, the said master, at my office in the City of 128
Albany, at a time therein designated by me, more than twenty days after the first publication of said notice, to wit, on the seventh day of May, 1887, at ten o'clock in the forenoon, and make proof as to their title thereto and the amount due thereon, copies of which notice, with proof of such publication thereof, are hereto annexed and referred to as a part of this my report.

SECOND.—That at the time and place specified in said notice I was attended by the complainant and its counsel and by other holders of said certificates 129
and their counsel, as will more fully appear by the minutes of the proceedings before me as such master, which are hereto annexed and marked Schedule F., and are referred to as a part of this my report, and upon that day and upon subsequent days to which said hearing was adjourned, testimony was taken and proceedings had before me as such master as will fully appear by said Schedule F.

THIRD.—I find and report that the holders of said certificates of indebtedness and the amounts

130 respectively due thereon, so far as the same have appeared before me, are as follows, viz.:

No. 633. Mrs. Louisa Strait, of Troy, N. Y., is the holder of certificate No. 633 for $500, to which are attached two coupons, due respectively January 1, 1886, and April 1, 1886, the former for $15 and the latter for $7.58. The amount due and unpaid thereupon at the date of this report is five hundred and seventy-eight dollars, to wit, the amount of said certificate and coupons and interest on the principal of said certificate from April 2d, 1886.

131 No. 634. Mrs. Cornelia Hand, of Chatham, N. Y., is the holder of certificate Number 634, for $500, to which are attached similar coupons as to the last mentioned certificate. The amount due and unpaid thereupon at the date of this report is five hundred and seventy-eight dollars, to wit, the amount of said certificate and coupons and interest on the principal of said certificate from April 2d, 1886.

Nos. 657, etc. The Massachusetts Mutual Life Insurance Company, of the City of Springfield, in the State of Massachusetts, is the holder of certificates numbers 657, 698, 655, 656, 654, 653, 652, 651,
132 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 697, 696, 695, 694, 693, 692, 691, 690, 689, 688, 687, 686, 685, 684, 683, 682, 681, 678, 677, 675, 676, 660, 659, 658, 650, 649, 648, 647, 646, 645, 602, 601, 600, 599, 598, 597, 596, 593, 584, 583, 537, 536, 535, 534, 533, 113, 52, 51, 50, 49, 48, 47, 46, 45, 44, 43, 42, 41, 40, 39, 38, 37, 36, 35, 34, 33, 31, 30, 29, 28, 27, 26, 25, 24, 23, 22, 21, 20, 17, 7, 5, 16, each for $500, upon each of the last above mentioned certificates is due at the date of this report the face thereof, with interest from July 1, 1886, to wit, the sum of five hundred and forty-eight dollars, in all, fifty-four thousand and eight hundred dollars.

There are no coupons attached to these last mentioned certificates. 133

No. 3. Calvin H. Allen, of Number 15 Broad Street, in the City of New York, is the holder of certificate Number 3, for $500, with coupons attached thereto, Nos. 6, 7, 8, 9, 10 for $15 each, and No. 11 for $7.58. There is due upon this certificate the face thereof, with interest thereupon from April 2d, 1886, and the amount of said coupons, amounting altogether at the date of this report to six hundred and thirty-eight dollars.

Nos. 4, 32, 636. Francis & Loutrell, of Maiden Lane, in the City of New York, are the holders of certificates Nos. 4, 32 and 636, each for $500, one coupon (Number 11) for $7.58 being attached to each. 134

There is due and unpaid thereupon the face of said certificates, with interest thereupon from April 2d, 1886, and the amount of said coupons, amounting in all at the date of this report to sixteen hundred and eighty-nine dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

Nos. 585, etc. Peter W. French, of Boston, in the State of Massachusetts, is the holder of certificates Numbers 585, 586, 587, 588, 589, 590, 591, 592, 594 and 595, each for $500, to which certificates no coupons are attached. There is due and unpaid upon each of these certificates the face thereof, with interest thereupon from April 2d, 1886, amounting at the date of this report to the sum of five hundred and fifty-five dollars and forty-two cents upon each of said certificates, the whole amount due upon said certificates being fifty-five hundred and fifty-four dollars and twenty cents. 135

Nos. 83, etc. Peter Butler, as receiver of the Pacific National Bank of Boston, is the holder subject to a pledge thereof to Lewis Coleman and John

136 Shepard of Boston, to protect them against their liability upon a bond given to dissolve an attachment issued in a suit brought against said Bank prior to the appointment of the receiver, of certificates Nos. 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109,110, 111, and 112, each for $500.

To each of these there is a coupon attached for $7.58.

There is due and unpaid upon them the amount thereof with interest thereupon from the maturity thereof and the amount of said coupons, in all
137 amounting at the date of this report to the sum of sixteen thousand eight hundred and ninety dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

Nos. 114, etc. S. R. Dickson, of No. 2 Wall Street, in the City of New York, is the holder of certificates Nos. 114, 115, 116,117,118, 119, 120,121, 122, 123, 124, 279, 282, 437, 438, 439, 440, 539, 540, 541, 280, 281, 441, 442, 635, 637, 639, 640, 6, 538, 542, for $500 each. To these certificates, no coupons are attached. There is due and unpaid upon them the amount thereof, with interest thereupon from the second day of April, 1886, amounting, at the date
138 of this report to the sum of seventeen thousand one hundred and sixty-two dollars and sixty cents, the sum of five hundred and fifty-five dollars and forty-two cents, being due upon each of said certificates.

Nos. 680 and 699. Mrs. Esther K. Carter, of the City of Albany, in the State of New York, is the holder of Nos. 680 and 699 for $500 each, to each of which are attached coupons for interest due April 2, 1886, $7.58. There is due and and unpaid upon these certificates the principal thereof, with interest thereupon from April 2, 1886, besides the amount of the said coupons thereto annexed, amounting in all at the date of this report to the sum of eleven

hundred and twenty-six dollars, the sum of five 139
hundred and sixty-three dollars being due upon each of said certificates.

No. 700. Mrs. H. N. Wright, of Chatham, Columbia County, N. Y., is the holder of certificate No. 700 for $500 to which are attached two coupons, one due January 1, 1886, and the other April 2, 1886, for $15 and $7.58, respectively. There is due thereupon the principal of said certificate and interest thereupon at six per cent. per annum, from the second day of April, 1886, besides the amount of said coupons, amounting in all to the sum five hundred and seventy-eight dollars, at the date of 140
this report.

Nos. 1 and 2. The estate of Cyrus S. Loutrell, deceased, is the owner and holder of certificates Nos. one and two for $500 each, to each of which are attached coupons Nos. 6 to 11, both numbers inclusive. There is due upon these certificates the amount of $500 each principal and the amounts of the coupons, viz.: $15 upon each of the first five coupons and $7.58 upon the sixth coupon upon each bond, together with interest upon the principal from second day of April, 1886, amounting in all at the date of this report to twelve hundred and seventy-six dollars, the sum of six hundred and thirty-eight 141
dollars being due upon each of said certificates.

Nos. 643 and 644. Mrs. Benjamin C. Gilbert, who resides at No. 291 State Street, in the City of Albany, N. Y., is the owner and holder of certificates Nos. 643 and 644 for $500 each, to each of which are attached coupons Nos. 10 and 11, which coupons fell due on January 11, 1886, for $15.00, and the other April 2, 1886, for $7.58. The amount due upon these last mentioned certificates is the principal thereof, and the amount of said coupons and interest upon the principal from April 2, 1886, amounting in all at the date of this report to

142 eleven hundred and fifty-six dollars, the sum of five hundred and seventy-eight dollars being due upon each of said certificates.

No. 638. John H. Van Tine, of Fishkill Landing, N. Y., is the owner and holder of certificate No. 638, to which no coupons attached. The amount due upon this certificate is the principal thereof, viz., five hundred dollars, with interest thereupon from the 2d day of April, 1886, at the rate of six per cent per annum, amounting in all at the date of this report to five hundred and fifty-five dollars and forty-two cents.

It further appeared before me that William C.
143 Van Alstyne, of the City of Albany, N. Y., is the owner of one of said certificates, but that the said certificate was not presented to me as such master, nor was any proof made as to the number thereof or the amount due thereon.

And I further find and report that Francis A. White, of the City of New York, is the holder of coupons maturing January 1, 1886, on said receiver's certificates of the Lebanon Springs Railroad Company, numbered as follows:

Certificate No. 5.

Certificates Nos. 7 to 31, both numbers inclusive.

144 " " 33 to 52, " " "
" " 113,
" " 533 to 537, " " "
" " 583 to 584, " " "
" " 593,
" " 596 to 602, " " "
" " 645 to 660, " " "
" " 675 to 678, " " "
" " 681 to 698, " " "

Also of coupons maturing April 2, 1886, being coupons No. 11 on the same certificates last above mentioned.

Also coupon No. 10 on certificates Nos. 679, 680 and 689, and of coupon No. 10 on certificate No. 4. 145

Also of coupon No. 10 on certificates Nos. 32, 636, and coupon No. 10 on certificates Nos. 585 to 592, both numbers included, and coupon No. 10 on certificates Nos. 594 and 595.

Also of coupons Nos. 10 and 11 on certificate No. 638, and of coupon No. 10 on certificate No. 6.

Also of coupon No. 10 on certificates Nos. 114 to 124, both numbers included; on certificates Nos. 279 to 282, both numbers included; on certificates Nos. 437 to 442, both numbers included; on certificates Nos. 538 to 542, both numbers included; on certificates Nos. 635 and 637, and on certificates 639 and 640. 146

Also of coupon No. 11 on certificate No. 6, on certificates Nos. 114 to 124, both numbers inclusive; on certificates Nos. 279 to 282, both numbers included; on certificates Nos. 437 to 442, both numbers included; on certificates Nos. 538 to 542, both numbers included; on certificates Nos. 635, 637, 639 and 640; on certificates Nos. 585 to 592, both numbers included; on certificates numbered 594 and 595.

Also of coupon No. 10 on certificates Nos. 83 to 112, both numbers included; on certificates Nos. 53 to 82, both numbers included; on certificates 125 to 199, both numbers included; on certificates Nos. 200 to 278, both numbers included; on certificates 283 to 399, both numbers included; on certificates Nos. 400 to 436, both numbers included; on certificates Nos. 443 to 532, both numbers included; on certificates Nos. 543 to 582, both numbers included; on certificates Nos. 603 to 632, both numbers included; on certificates Nos. 641 and 642. 147

That there is due and unpaid at the date of this report upon said coupons the sum of nine thousand

148 seven hundred and sixty-one dollars and thirty-six cents.

And I further find in regard to the last-mentioned coupons held by Francis A. White that said coupon No. 10 from the certificates owned and held as aforesaid by the complainant, the Central National Bank of Boston, and mentioned in Schedule M, annexed to the testimony herein, were paid by Roger N. Allen acting as agent of the American Finance Company before their maturity, to the said complainant, and that no transfer was taken by said Allen, as such agent, of said coupons upon such payment.

That the said coupons so paid to complainant were afterwards transferred to said White by the
149 said Finance Company.

And I further find as a conclusion of law that the said Francis A. White is entitled to be paid the amount of said coupons out of any surplus of the proceeds of sale in this case remaining after the payment of the amount due upon the certificates held by the complainant and by the receiver of the Pacific National Bank of Boston, and after the payment of the amount of the certificates held by other parties than said complainant and said receiver so far as relates to the coupons from certificates held by said bank; but that as to the coupons from certificates held by said other parties and which were not paid to the complainant, the said holder is entitled to share *pro rata* in the proceeds of the
150 said sale.

And I further report that the matter of the just proportion and amount for the holders of the said certificates other than the complainant to contribute to the expense of this suit, is postponed until after the sale has taken place pursuant to the decree, as such amount cannot be ascertained and determined until after such sale. All of which is respectfully submitted.

Dated February 7, 1888.

WILLIAM LANSING,
Master.

(*From the Record, folio 435 of printed book.*)

At a Special Term of hte Supreme Court of New York, held at the Town Hall in the Village of Saratoga Springs, on the 10th day of November, 1891. 1

Present — HON. JOHN R. PUTNAM, Justice.

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, ANDREW A. DOUGLAS, as trustee under the last will and testament of WILLIAM HENRY DOUGLAS, deceased, and IDA S. HARRISON. 2

Plaintiffs,

AGAINST

THE UNION TRUST COMPANY OF NEW YORK, James C. Hull, William Butler Duncan, John G. McCullough, as adminstrator of the goods, chattels and credits of Trenor W. Park, deceased; The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as receiver of the property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, the Harlem Extension South Coal Transportation Company, the Central National Bank of Boston; Peter Butler, as receiver of the property of the Pacific National Bank of Boston; The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van 3 4

Judgment 10th November, 1891.

Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company, and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwell, John H. Cheever, Charles H. Dewing, John A. Nichols, Henry A. Tweed, as surviving trustee of the creditors and stockholders of the New York Loan and Indemnity Company, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndyke, William F. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting, and Eustace C. Fitz, and William D. Shipman, as assignee of William Butler Duncan,

Defendants.

On reading and filing the affidavit of Edward Winslow Paige, one of the attorneys for the plaintiffs, and of George O. Vander Bogert, proving the service of the summons and complaint upon the defendants, the Union Trust Company of New York, Jesse C. Hull, the New York, Boston and Montreal Railway Company, William Watts Sherman, Marvin Sackett, Russull C. Root, the Harlem Extension Railroad South Coal Transportation Company, William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing, John A. Nichols and Henry A. Tweed, more than twenty days since; and also proving that no one of the above-named defendants have appeared, or put in any answer or demurrer to the complaint in the action; and also proving that due notice of the pendency of this action was filed

in the offices of the clerks of Rensselaer and Columbia counties on the 10th day of October, 1887, and that another due notice of pendency of this action was duly filed in said offices on th 24th day of September 1888, and the Court having computed the amount due on the various bonds and mortgages and receiver's certificates hereinafter referred to and having taken proof of the facts and circumstances stated in the complaint, by which computation and proof, it appears that the several amounts hereinafter stated are due upon this 10th day of November, 1891, and that the facts hereinafter stated are true.

And it further appearing to the Court that the following defendants have appeared and put in answers to the complaint, namely: the defendant William Butler Duncan, by his attorney, Solomon Hanford; the defendant, John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, by his attorneys, Jennings & Russell; the defendants, Jessie Seligman and John Crosby Brown, by their attorneys, Bangs, Stetson, Tracy and MacVeagh, the defendant, Daniel Butterfield, as receiver, by his attorneys, Deady and Goodrich; the defendant, the Central National Bank of Boston, Peter Butler, as receiver of the property of the, Pacific National Bank of Boston; the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White Mary Gilbert and Sarah Gilbert, by their attorneys, Hale and Bulkley; the defendants William Foster, Jr. and Rowland N. Hazard, by their attorney, John Yard; the defendant, the New York, Rutland and Montreal Railway Company, by its attorneys, Vanderpool, Green and Cuming; the defendant, The American Loan and Trust Company, by its attorney, Delos McCurdy; the defendants, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Elmund N. Converse, S. Lothrop Thorndyke, William Gladden, Ezra H Baker, Philip I. Moen, H. A. Whiting and Eustace C. Fitz, by their attorney, Robert Ludlow Fowler; and the defendant, William D. Slipman, as assignee, by his attorney, Peter T. Barlow, and

the issues thus made having been regularly brought on for trial at a Special Term of this Court, held at the Court House in the City of Troy, on the first Monday of May, 1891, and the same Special Term having been adjourned to be held at the Town Hall, in the village of Saratoga Springs, on the ninth day of June, 1891, and the said issues having been then so tried by virtue of such adjournment and of the written stipulation of the parties, and the Court having made and filed its decision thereon in writing, containing the following findings of fact and conclusions of law and directions for judgment, that is to say:

Facts.

1.—That the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation under and by virtue of the laws of the State of New York, by the filing of its articles of incorporation or association on the twenty-fifth day of March, one thousand eight hundred and fifty-two, and by the provisions of the following acts of the Legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An Act to authorize the Lebanon Springs Railroad "Company to construct an extension of its road into "Massachusetts and Vermont, and to provide means "therefor," passed March 8th, 1853, and being Chapter 25 of the Laws of that year;

"An Act to amend an Act entitled "An Act to "to authorize the Lebanon Springs Railroad Company "to construct an extension of its road into Massachusetts "and Vermont, and to provide means therefor," passed "March 8th, 1853," passed June 24th, 1853, and being Chapter 461 of the Laws of that year;

"An Act to enable certain connecting railroad com-"panies to aid in the construction of the Lebanon "Springs Railroad," passed April 13th, 1855, and being Chapter 350 of the Laws of that year;

"An Act to extend the time for the completion of the "Lebanon Springs Railroad," passed April 12th, 1860, and being Chapter 285 of the Laws of that year;

"An Act to extend the time for the completion of "the Lebanon Springs Railroad," passed April 22d, 1862, hnd being Chapter 444 of the Laws of that year;

"An Act to amend the charter of Lebanon Springs "Railroad Company," passed April 9th, 1864, and being Chapter 145 of the Laws of that year;

"An Act to authorize any town in the Counties of "Columbia and Rensselaer to aid in the completion of "the Lebanon Springs Railroad," passed April 4th, "1866, and being Chapter 373 of the laws of that year;

"An Act to extend the time for the completion of "the Lebanon Springs Railroad," passed 26th February, 1867, and being Chapter 46 of the laws of that year;

And by virtue of the same it became vested with all the powers and franchises of corporations stated in the Revised Statutes of New York, and of railroad corporations stated in "An Act to authorize the formation of Railroad Corporations, and to regulate the same," passed by the Legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto, and with power to purchase, construct and operate during the period of its corporate existence, and of any extensions or renewals thereof, the railroad hereinafter described, extending from Chatham Four Corners, in the County of Columbia, northerly through the Counties of Columbia and Rensselaer to the borders of the State at Bennington, and also with the certain other special and particular powers and franchises stated in the above Acts, and also all the following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the managing of the business thereof, which it might do if that part were within the State of New York.

22 To create preferred stock at such a rate of dividend, or interest, and with such securities therefor, as it might deem expedient.

To extend its road by construction or purchase into the States of Vermont and Massachusetts as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties
23 should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate either itself alone, or after consolidation with any other company into a single corporation, with any company having a railroad or the right to construct a railroad which, or a portion of which, should be in the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad com-
24 panies mentioned in the Act entitled "An Act to authorize the consolidation of certain railroad companies," passed by the Legislature of New York, April 2 l, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which it might construct or acquire within the States of Vermont and Massachusetts, as it might exercise if the same were wholly within the State of New York.

To have its stock and bonds taken and owned or
25 guaranteed by any company having or being authorized to construct a railroad connecting with the line of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of its railroad from

the Massachusetts State line as declared in its articles of 25
association to any point within the town of Hoosick, in the County of Rensselaer, or the town of White Creek, in the County of Washington.

To construct a branch to a terminus at the Vermont State line at a point of junction with the western Vermont Railroad, now known as the Bennington and Rutland Railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same 26
effects as if the line of the said company had been originally fixed in its articles of association both as to its main line and branches as the same are last above described, and the termini thereof had been its original terminus.

That by virtue of the following acts which were duly passed by the Legislature of the State of Vermont, to wit:

"An Act to incorporate the Vermont and New York "Railroad Company," approved November 2, 1885, and 27
being No. 134 of the laws of that year:

"An Act to amend an Act entitled 'An Act to incor-"'porate the Vermont and New York Railroad,' approved November 2, 1865," approved November 19, 1866, and being No. 167 of the laws of that year;

"An Act authorizing the Bennington and Rutland "Railroad Company to consolidate their road with the "road of the Lebanon Springs Railroad Company," approved November 21, 1867, and being No. 155 of the 28
laws of that year;

"An Act to enable the Bennington and Rutland "Railroad Company to aid in obtaining necessary rail-"road connections," approved March 28th, 1867, and being No. 2 of the special session laws of that year — the Vermont and New York Railroad Company was inporated with the powers and franchises of railroad corporations under the laws of Vermont, and to build, own and operate a railroad from Bennington to the Vermont

29 State line, being that portion of the railroad hereinafter described which is within the State of Vermont, and to transfer and convey such powers and franchises and any property to the said Lebanon Springs Railroad Company, and to consolidate, by a vote of a majority of its stockholders. with the Lebanon Springs Railroad Company.

That said company was duly organized, and its road duly located and the construction thereof commenced.

That afterwards, on or about the twentieth day of
30 August, 1867, the Vermont and New York Railroad Company, by its deed of conveyance of that date, in all respects duly authorized, executed, acknowledged and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebrnon Springs Railroad Company the said Vermont and New York Railroad so located as aforesaid, with all its privileges and appurtenances and all the rights and franchises of said Vermont and New York Railroad Company.

31 The Lebanon Springs Railroad Company constructed said railroad from Chatham to Bennington, hereinafter described, including the completion of the Vermont and New York Railroad, and completed the same and opened it to the public early in the year 1869, and, except as otherwise hereinafter alleged, has always and ever since operated the same as a railroad.

And it also became possessed and the owner of the following described property, to wit: All and singular
32 the track or roadway of the Lebanon Springs Railroad, from the Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in town of Hoosick, in the County of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said the Lebanon Springs Railroad Company already built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and

also all the tolls, incomes, rents, issues and profits of 33
any and all of the same, and of any and all of the above mentioned powers and franchises; and also all the rolling-stock, locomotives: tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York Railroad, constructed from the terminus of the railroad last above 34
described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above mentioned powers and franchises of the said Vermont and New York Railroad Company belonging to or in any wise appertaining to, or which may at any time belong or appertain, or have belonged or appertained to the same or either of said railroads or companies, as well in law as in equity; including also the property of every kind, name or nature of, or purchased by or in the possession 35
of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company, and John W. Valkenburgh as Receiver, and including also all property, powers and franchises of every name or nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867.

That none of the above mentioned rights, powers and franchises have lapsed, been lost, forfeited or expired, 36
but all of the same are still in full force and life, and subject to the lien of the above mortgage, and will pass in like full force and life to any purchaser or purchasers on a sale under such mortgage, and to any new corporation organized by such purchaser or purchasers, pursuant to the laws of New York.

That the Lebanon Springs Railroad Company possessed and enjoyed all the powers, rights and franchises above mentioned, until it became consolidated with the

Bennington and Rutland Railroad Company as hereinafter described.

That on the first day of July, 1867, the said Lebanon Springs Railroad Company duly issued and sold its bonds to the amount of two millions of dollars to individuals and to towns.

That to secure the payment of said bonds the said Lebanon Springs Railroad Company, on the first day of July, 1867, duly executed and delivered to the defendant the Union Trust Company of New York, a corporation organized and then and still existing under the laws of New York, its certain mortgage bearing date on that day, whereby it duly mortgaged all its property, rights, powers and franchises hereinabove stated to the said Union Trust Company of New York, in trust, to secure the payment of the said bonds.

That said bonds bore interest at the rate of seven per centum per annum, payable on the first day of January and July in each year, and the principal in thirty years from the date thereof.

That said mortgage was at the time of the foreclosure and sale hereinafter mentioned the first mortgage and lien upon all the said property, powers and franchises, and contained a proviso in substance the same as the condition of the said bonds, and with power and authority in case of default in the payment of the principal, or of the interest thereon, as therein specified, to sell the said mortgaged property in due form of law; and also contained in the following:

"And should the said trustee fail to forthwith take "possession of said railroad and the mortgaged property "the same as hereinbefore authorized, any holder of "any of said bonds secured by this mortgage may ap- "ply in behalf of himself and the other holders of the "bonds hereby secured, to the Supreme Court on notice "to the party of the first part and to the said trustee "under this mortgage or its successors, by action or "otherwise as the said Court may direct, for the ap-

"pointment of a receiver of the said mortgaged prem-
"ises and property, and on such application the said
"Supreme Court may appoint such receiver with powers 41
"as are herein conferred upon said trustees, and as apper-
"tain to receivers in such cases, and said trustee shall have
"the like power to apply for a receiver, and should the
"said trustee neglect or refuse after January first, one
"thousand eight hundred and sixty-nine, to institute an
"action for the foreclosure of this mortgage, or to prose-
"cute such action or the proceedings for such sale with
"due diligence, it shall be lawful for any holder of the
"bonds hereby secured to apply in behalf of himself and
"the other holders of said bonds to the said Supreme 42
"Court on notice to the party of the first part, and to
"said trustee or its successors by action or otherwise, as
"the said Supreme Court shall direct, for a sale of said
"mortgaged premises, and on such application it shall be
"lawful for the said Court to order such sale according
"to the course of practice of said Court in cases of fore-
"closure of mortgages. But in case of such application
"or action by any bondholder for a receivorship, or for a
"sale, it shall not be lawful for any bondholder to make
"a similar application or to bring a similar action while 43
"said first mentioned application or action or proceeding
"therein or thereunder is or are pending."

That the plaintiff Stevens is the owner of and holder of said bonds to the amount of three thousand, one hundred dollars stated at par value of principal of the same. That the plaintiff, Rogers, is the owner of said bonds to the amount of $1,00 stated at par value of the principal of the same, and has been such owner and holder ever since the year 1867, That the plaintiff Wilbur is the owner and holder of said bonds to the amount of $1,000, 44 stated at par value of the principal of the same, and that she inherited the same from her sister, Elvira E. Peabody, 21 August, 1881. That the plaintiff Douglas, as Trustee under the last will and testament of William Henry Douglas, deceased, is the owner and holder of said bonds to the amount of $12,000, stated at par value of the principal of the same, and as such trustee has been

45 owner and holder ever since 1875. That the plaintiff Harrison is the owner and holder of such bonds to the amount of $50,000, stated at par value of the principal of the same.

That no part of the interest thereon nor upon any of said bonds has been paid since the year 1870.

That early in the year 1870 the Lebanon Springs Railroad Company duly consolidated its road, franchises and property with the road, franchises and property of the Bennington and Rutland Company, a corporation
46 therefore duly organized and existing under the laws of the State of Vermont and owning and operating a railroad from Bennington in that state, where it connected with the railroad of the Lebanon Springs Railroad Company, to Rutland, in said state, and also a branch two miles long running from North Bennington westerly to the New York State line, and one company was thus formed of said two companies under the name of the Harlem Extension Railroad Company, which said last-named corporation became entitled to all and singular the
47 rights, properties and franchises of said two railroad companies, and subject to all their and each of their respective liabilities.

That afterwards and on the first day of April, 1870, the said Harlem Extension Railroad Company executed its certain bonds, amounting in aggregate to the sum of four millions of dollars, and bearing interest at seven per centum per annum, of which, however, only the sum of one million five hundred thousand dollars
48 were issued, and at the same time and to secure the payment of the said bonds, it executed to the Union Trust Company of New York a mortgage upon all its property, roads and franchises, which contained a proviso, in substance the same as the conditions of the said bonds. The remainder of the said bonds of the said Harlem Extension Railroad Company, being two millions five hundred thousand dollars thereof, were reserved to take up and be exchanged for the two million dollars of bonds of the Lebanon Springs Railroad

Company, before mentioned, and five hundred thousand dollars of bonds which had been issued by the said Bennington and Rutland Railroad Company, but such bonds of the Lebanon Springs Railroad Company were never surrendered or exchanged, but accordingly only one million five hundred thousand dollars of the said bonds of the Harlem Extension Railroad Company were ever issued as above stated. 49

That the plaintiff Stevens is the owner and holder of said bonds to the amount of five thousand dollars, stated at par value of the principal of the same; and that the plaintiff, Douglas, as Trustee under the last will and testament of William Henry Douglas, deceased, is the owner and holder of said bonds to the amount of $1,000, stated at par value of the principal of the same. 50

That the interest upon the said bonds of the Lebanon Springs Railroad Company was paid up to and including that due in January, 1869, but that nothing had ever been paid upon any of them since, and nothing at all has been paid upon any of the bonds issued by the Harlem Extension Railroad Company. 51

That both said mortgages were duly recorded in the Clerk's offices of the Counties of Columbia and Rensselaer according to the laws of the State of New York, and in the County of Bennington, in the State of Vermont, according to the laws of the State of Vermont.

That on the 22d day of February, 1872, The Union Trust Company of New York began an action in the Supreme Court of New York to foreclose the said mortgage, executed by the said Lebanon Springs Railroad Company, by reason of the aforesaid default in the payment of interest thereon, in which action the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan, and James B. Hodgskin were made defendants. That due notice of the pendency of said action, according to law and the practice of that Court, was duly filed in the offices of the Clerks of the Counties of Rensselaer and Columbia on the 24th day of February, 1872, and that all the defend- 52

53 ants in such action were duly and regularly served with the process of this court, and subjected to the jurisdiction thereof, and duly and regularly appeared in such action therein, prior to the first day of May, 1872.

That on or about the 15th November, 1872, it filed bills in the Court of Chancery of the State of Vermont to foreclose both of the said mortgages, in which actions the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants, which defendants were regularly served with pro-
54 cess and submitted to the jurisdiction of, and appeared in that court, in both such actions, prior to the first December, 1872.

While the above-mentioned actions were pending, and on the 18th December, 1872, the Harlem Extension Railroad Company, and the Pine Plains and Albany Railroad Company, a corporation duly organized under the laws of the State of New York, duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of the Harlem
55 Extension Railroad Company; and certain other railroad companies then existing under the laws of the State of New York, namely, the New York and Boston Railroad Company, the Putnam and Dutchess Railroad Company and the Dutchess and Columbia Railroad Company, on the 18th December, 1872, duly consolidated their roads, property, franchises and capital stock and thus formed one company under the name of the New York, Boston and Northern Railway Company, and afterwards and by an agreement made the 19th Decem-
56 ber, 1872, but not filed in the office of the Secretary of State of New York until 21st January, 1873, the said last-named the Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of the New York, Boston and Montreal Railway Company, which is one of the defendants herein.

That such several consolidations were legal and duly

and strictly in accordance with the laws of New York 57
and Vermont, and the defendant. the New York, Boston and Montreal Railway became thereby the owner of and entitled to all the roads, property and franchises of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as hereinbefore stated, subject to the said mortgage given by the Lebanon Springs Railroad Company and also of all the other mortgages above named, and subject to all of their and each of their respective liabilities, and to the pendancy of said actions.

58

That the above mentioned foreclosure suits were proceeded with, and such proceedings had therein that, in the said action in the Supreme Court of New York, judgment of foreclosure of the said mortgage given by the Lebanon Springs Railroad Company, and for a sale of all the road, property, powers and franchises of the Lebanon Springs Railroad Company within this State, was duly rendered by said court in that action, and was on the same day duly entered in the Clerk's office of Rensselaer County, which said judgment is in the words 59
and figures following :

60

61 "At a Special Term of the Supreme Court of the State of New York, held at the Court House, in the City of Troy, County of Rensselaer, on the 10th day of December, 1872.

Present—Hon. WILLIAM L. LEARNED, Justice.

UNION TRUST COMPANY OF NEW YORK,
62 as Trustee,
AGAINST
THE LEBANON SPRINGS RAILROAD COMPANY, The HARLEM EXTENSION RAILROAD COMPANY, WILLIAM BUTLER DUNCAN, JAMES D. HODGSKIN.

On reading and filing the affidavit of S. T. Fairchild,
63 attorney for the plaintiff in this action, proving the service of the summons and notice of object of suit in this action, and the affidavit of said attorney for the plaintiff that no answer or demurrer has been put in to the complaint in said action, and that due notice of the pendency of this action was duly filed in the offices of the Clerks of the Counties of Rensselaer and Columbia, on the 24th day of February, 1872, and on reading and filing the report of the Referee to whom it was referred by an order of this Court to compute the
64 amount due and to become due to the plaintiff upon the bonds and mortgages mentioned and set forth in said complaint, by which report, bearing date the 10th day of December, 1872, it appears that the sum of five hundred and fifty-two thousand two hundred and twenty-two dollars and twenty-two cents was actually due upon said bonds and mortgage at the date of said report for interest, and that the further sum of two millions of dollars will become due to said plaintiff on the first day of July, 1891, for principal upon

said bonds and mortgage, besides interest thereon from 65
the date of said report; and on motion of S. T. Fairchild, attorney for the plaintiff,

It is ordered, that the said report be and the same hereby is in all things confirmed, and on like motion as aforesaid, it is adjudged that the mortgaged property and premises described in the complaint in this action as hereafter set forth, be sold together and not separately, at public auction in said County of Rensselaer, by or under the direction of Charles S. Fairchild, who is hereby appointed as Referee for that purpose; and the said 66
Referee give public notice of the time and place of such sale according to law and the practice of this Court; that either of the parties to this action may purchase at such sale; that the said Referee execute to the purchaser or purchasers a deed or deeds of the property and premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold at the time, he pay to the plaintiff, or its attorney, the sum to be taxed hereby adjudged to the plaintiff for 67
costs and charges in this action with interest from the date hereof, which costs have this day been adjusted and taxed by the Clerk of said County of Rensselaer, at ninety-seven dollars and forty-nine cents, and that he also pay to the plaintiff the amount so reported due as aforesaid, together with the legal interest thereon, from the date of the said report, or so much as the purchase money of the mortgaged premises will pay of the same, take a receipt therefor and file it with his report of sale; and he deposit the surplus (if any) with the Union Trust 68
Company of New York to the credit of this action, to be drawn only on the order of this Court, signed by the Clerk and Judge thereof, within five days after he receives the same; that he make a report of such sale and file it with the Clerk of this Court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interests and costs as aforesaid, the said Referee specify the amount of such deficiency in his report of

69 sale, and that the defendant, the Harlem Extension Rail-road Company, pay the same to the plaintiff, and that the purchaser or purchasers at such sale be let into possession on production of the said deed.

And it is further adjudged that the defendants and all persons claiming under them, or any or either of them, after the filing of the aforesaid notice of pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

70 The following is a description of the mortgaged property and premises hereinbefore mentioned, as contained in said mortgage, viz.: "All the right, title and interest of the said party of the first part of, in and to all and singular the several pieces or parcels of land forming the tract or roadway, of the party of the first part, from the Chatham Four Corners, in the County of Columbia, to the East line of the State of New York, in the Town of Hoosick, in the County of Rensselaer, and all lands 71 hereafter to be acquired for the purpose of forming said tract or roadway, also the railroad of the said party of the first part now built and to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part connected with said railway or relating thereto, including its rights and franchises as a corporation; and also all the rolling-stock, locomotives, 72 tenders, snow-plows and scrapers, all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, repairing and replacing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith and not seperate therefrom, and to be

taken as a part thereof; and also all the right, title and 73
interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York Railroad, constructed or to be constructed, from the terminus of the railroad of the party of first part in the town of Hoosick aforesaid, to the Village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in an to the franchise and equipment of the said Vermont and New York Railroad belonging or in any wise appertaining or which may at any time belong or appertain to the 74
same as well in law as in equity.

Grated Dec. 10th, 1872.

W. L. L.

Filed Dec. 10th, 1872, at 11 h. 30 a. m."

Under said judgment, the property and franchises therein described were sold on the 25th day of January, 1873, by Charles S. Fairchild, a Referee duly appointed by said Court in that behalf, at Greenbush, in the County of Rensselaer, to the defendant, William Butler Duncan, 75
for the price of one hundred thousand dollars, and said Referee thereupon, by direction of the said Duncan, executed and delivered to the defendant, James C. Hull, his deed of the said road, property and franchises, bearing date the said 25th January, 1873, and said deed was duly recorded in the Clerk's office of Rensselaer and Columbia Counties.

On the seventh day of December, 1872, a decree of foreclosure of the same mortgage, and also a decree for 76
the foreclosure of the Harlem Extension mortgage, and directing a sale of all the roads, property, powers and franchises within the State of Vermont, of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as set forth in the first finding above, were duly passed by the Court of Chancery of Vermont, and enrolled and filed in that Court as aforesaid; that said decree in the first of such actions was in the words and figures following:

77 "Decree.

BENNINGTON COUNTY.

STATE OF VERMONT,

DECEMBER TERM.

THE UNION TRUST COMAANY OF NEW
78 YORK

AGAINST

THE HARLEM EXTENSION RAILROAD COMPANY and THE LEBANON SPRINGS RAILROAD COMPANY.

} In Equity.

Decree.

79 And now upon the orator's bill in this cause on file, setting forth the charter of the Vermont and New York Railroad Company, the location and partial construction of the Vermont and New York Railroad, extending from the Village of Bennington, in the County of Bennington, to the State line between Vermont and New York, at Hoosick, in the County of Rensselaer and State of New York; the due conveyance of said road to the Lebanon Springs Railroad Company, its completion so as to connect the Lebanon Springs Railroad at said Hoosick with
80 the Bennington and Rutland Railroad at Bennington; the consolidation of the stocks, franchises and property of said Lebanon Springs Railroad Company and of said Bennington and Rutland Railroad Company, and the formation thereby of the Harlem Extension Railroad Company; the execution by the said Lebanon Springs Railroad Company before said consolidation of a mortgage of said Vermont and New York railroad to the orator as trustees to secure the payment of the bonds of

said Lebanon Springs Railroad Company and the interest 81
thereon ; the non-payment of said interest when due, and the forfeiture thereby of the condition of the said mortgage, and upon due appearance of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company by their respective solicitors, said bill having been taken as confessed, and the cause having been referred to a Master to ascertain the amount due under said mortgage, by whose report on file it appears that there is due of unpaid interest under said mortgage the sum of four hundred and ninety thousand dollars, all of which 82
by the files, records and entries in this cause in this court remaining, and which are hereby referred to as a basis of this decree, will more fully and at large appear.

It is ordered, ajudged and decreed by the court at this term that the said Lebanon Spring Railroad Company and said Harlem Extension Railroad pay to the orators as trustees the said sum of four hundred and ninety thousand dollars, with interest hereafter to accrue, and the costs of this suit taxed at the su n of thirty-one dollars and thirty-five cents, before the 20th day of January, 83
1873.

And in default of such payment that all the said mortgaged property, namely, the said railroad formerly known as the Vermont and New York Railroad, its rights, privileges and appurtenances, and all the franchises to possess, own and maintain and operate the same, and all the right, title, estate and interest of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company therein, shall be sold at auction to the highest bidder, for cash, on the 20th day of January, 84
1873, at two o'clock in the afternoon, at the Court House in Bennington, in the County of Bennington, to satisfy this decree.

And DAVID MCEOWEN, Esq., of Bennington, is hereby appointed a Special Master in Chancery to conduct and make said sale.

And he is hereby directed to give notice of said sale by advertising the same, and the substance of this decree,

85 once a week for five weeks next preceding said sale in the *Bennington Banner*, newspaper published at Bennington aforesaid ; in the Manchester, in said County of Bennington ; in the *Rutland Herald*, a newspaper, published at Rutland, in the County of Rutland ; and in the *New York Daily Times*, published in the City of New York.

And to hold said sale at the [illegible] place appointed, in conformity with the direction of this decree and the terms of said advertisement, and to sell said mortgaged property and franchises to the highest bidder, for cash at fair
86 public vendue, and to execute a suitable and sufficient conveyance thereof, to the purchaser, which shall recite the substance of this decree, and the proceedings under it, and shall be executed in the manner required by law of this State.

And said Master shall make due and full return of his proceedings to this court, and shall pay into Court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and
87 prove their claims under the direction of the Court.

And if said proceeds shall be more than suffieient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the Court upon application of parties in interest.

And said Master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as may be allowed by the Court upon his application.

88 And the orators shall be allowed from said fund their just charges and expenses.

Done in Court in said Bennington this 6th day of December, 1872.

HOYT H. WHEELER,
Chancellor.

E. J. PHELPS,
Solicitor for Orator.

This decree is certified to be in due form and correct. 89

E. J. PHELPS,
Solicitor.

Filed in Court, December 7th, 1872.

JOHN V. HALL,
Clerk."

And that said decree in the second of said actions was in the words and figures following : 90

"Decree.

STATE OF VERMONT, }
Bennington County. }

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE HARLEM EXTENSION RAILROAD COMPANY.
} In Equity. 91

Decree.

And now upon the orator's bill in this cause on file, setting forth the formation of the said Harlem Extension Railroad Company, by consolidation of the Bennington and Rutland Railroad Company Vermont and the Lebanon Springs Railroad Company of New York, by agreement and proceedings therein referred to and stated. 92 And further setting forth the due execution by said Harlem and Extension Railroad Company to the orators as trustees of a mortgage of the consolidated railroads, franchises and property belonging to said Harlem Extension Railroad Company, to secure the bonds or notes of said company and the interest thereon. The issue and sale of said bonds and the non-payment of the interest

93 thereon when due, and that the principal of said bonds had thereby become due.

And praying for a foreclosure of said mortgage, and a sale of said mortgaged property and franchises so far as the same are in the State of Vermont. And upon his appearance for said Harlem Extension Railway Company by their solicitor, said bill having been taken as confessed, and the same having been referred to a Master to ascertain the amount due, whose report has been filed, all of which by the filed records and entries in the cause
94 now in Court remaining, and which are hereby referred to as the basis of this decree, will more fully and at large appear,

It is ordered, adjudged and decreed by the Court, at this term, that the said Harlem Extension Railroad Company pay to the orators, as trustees, under said mortgage, the sum of one million six hundred and fifty-seven thousand five hundred dollars, being the amount so shown by said Master's Report to be due under said mortgage, together with the interest to accure thereon,
95 and the costs of this suit, before the 20th day of January, 1873. Said costs being taxed at the sum of thirty-one dollars and thirty-five cents.

And that, in default of such payment, all the railroads, property and franchises covered by said mortgages so far as the same lien or exist within the State of Vermont, being the said Bennington and Rutland Railroad, and said Vermont and New York Railroad, with all their and each of their lands, privileges, appurtances, rights, premi-
96 ses and property of every description in the State of Vermont, and all the right, title, interest and estate of said Harlem Extension Railroad Company therein, and all the franchises of said company to be a corporation, and to have, own, maintain and operate said railroads, so far as derived under the laws of Vermont, be sold at public auction for cash, to the highest bidder, on the 20th day of January, 1873, at ten o'clock in the forenoon, at the Court House at said Bennington.

And Daniel McEowen, Esq., of Bennington, is here-

by appointed a Special Master in Chancery to conduct said sale. 97

And he is hereby directed to give notice of said sale by advertising the same, and the substance of this decree, weekly once a week for five weeks next preceding said sale in the *Bennington Banner*, newspaper published at Bennington ; in the *Manchester Journal*, newspape published at Manchester, in said County of Bennington ; in the *Rutland Herald*, a newspaper, published at Rutland, in the County of Rutland ; and in the *New York Daily Times*, newspaper published in the City of New York. 98 And to hold said sale at the time and place appointed, in conformity with the direction of this decree and the terms of said advertisement, and to sell said mortgaged property and franchises to the highest bidder, for cash at fair public vendue, and to execute a suitable and sufficient conveyance thereof, to the purchaser, which shall recite the substance of this decree, and the proceedings under it, and shall be executed in the manner required by laws of this State.

99

And said Master shall make due and full return of his proceedings to this Court, and shall pay into Court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and prove their claims under the direction of the Court.

And if said proceeds should be more than suffieient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the Court upon that application of parties in interest.

100

And said Master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as the Court on his application shall direct.

Said sale to be subject to the rights of the orators, the said Union Trust Company, as trustee, under a certain mortgage of the Bennington and Rutland Railroad, made by the Bennington and Rutland Railroad Company on the 15th day of August, 1867, to secure the sum of five

101 hundred thousand dollars in the bonds of said company.

Done in Court at Bennington this 6th day of December, 1872.

HOYT H. WHEELER,
Chancellor.

E. J. PHELPS,
Solicitor for Orators.

This decree is certified to be in due form and correct.

E. J. PHELPS,
102 Solicitor.

And under and in pursuant of such decrees the said road, property, powers and franchises within the State of Vermont, were, by Daniel McEowen, a Special Master in Chancery, appointed by the said Court for that purpose, on the 20th day of January, 1873, sold to Charles G. Lincon, of Bennington, Vermont, for the sum of fifty thousand dollars, and that the said Special Master executed and delivered to the said Charles G. Lincoln deeds of
103 said road, property, powers and franchises bearing date the said 20th day of January, 1873, and said deeds were duly recorded in the office of the Clerk of the County of Bennington, Vermont, on the 22nd January, 1873.

That no part of either of said sums of one hundred thousand dollars and fifty thousand dollars has ever been paid; and that the Union Trust Company has never done anything to enforce such payment, nor anything under either mortgage since. On the 28th January, 1873,
104 the said defendants Hull and Lincoln, without any consideration, executed and delivered to the defendant Duncan and one Trenor W. Park a bond condition for the payment of five milions of dollars on or before the first of August, 1873, with interest at seven per centum per annum, and also they and the defendant Malissa A. Hull executed and delivered to said Duncan and Park a mortgage to secure the payment of the same, conveying all the roads, property, powers and franchises of the Harlem Extension Railroad Company,

including those of the Lebanon Springs Railroad Company and the New York and Vermont Railroad Company in both States, as hereinbefore set forth. Said mortgage was recorded in the offices of the Clerks of Rensselaer and Columbia Counties on the the 14th February, 1873, and in the Clerk's office of Bennington County, Vermont, on the first May, 1873, 105

The said Duncan and Park both then knew that the consideration for the deeds upon said sales in said actions remained unpaid.

That on the 30th of January, 1873, the defendants, James C. Hull and Malissa A. Hull, his wife, by their deed executed and delivered on that day, without any consideration, conveyed all said roads, property and franchises situated in the State of New York to the defendant, the New York, Boston and Montreal Railroad Company, subject, however, to said mortgage to said Duncan and Park; which deed was then duly recorded in Rensselaer and Columbia Counties ; that at the same time the defendant, Lincoln, by a deed executed and delivered by him, likewise for no consideration, conveyed said roads, property and franchises situated in the State of Vermont to the New York, Boston and Monteral Railroad Company, subject, however, to said mortgage to Duncan and Park and said five hundred thousand dollars mortgage on the old Bennington and Rutland Railroad, which deed was then duly recorded in Bennington County, Vermont. 106 107

That the said five million dollar mortgage made to Duncan and Park represented substantially the aggregate indebtedness, being the aforesaid bonds of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, which the defendant, the New York, Boston and Montreal Railroad Company was to assume and pay according to the terms of the consolidation agreement by which it was formed, and the above mentioned other agreements and arrangements under which the property of said Harlem Extension Railroad Company was to be acquired by said New York, Boston and Montreal Railway Company, as before stated, and was 108

made in order to secure and maintain a lien upon the said premises, for the payment of such indebtedness, and that in accordance with such arrangement an agreement was made on or about February 11th, 1873, between the defendant, the New York, Boston and Montreal Railway Company, and the said Duncan and Park, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company to the defendant Duncan, who was to have the custody of said moneys, and to disburse the same, to secure the payment and discharge of the aforesaid five million dollar mortgage, and that in pursuance of said agreement and other agreements and arrangements relating to the same matter, the said bond and mortgage, together with a satisfaction thereof, in writing, were placed in the custody of Jesse Seligman and John Crosby Brown, two of the trustees in said agreements mentioned, who were in accordance with the provisions of the said agreements, and arrangements and were authorized by power of attorney to receive and to endorse upon said bond the payments that should be made thereon, and upon full payment thereof, if within the time stipulated, to file said satisfaction piece and thus discharge said mortgage of record, but in case of a failure by said company to pay the full amount due on or before the first day of August, 1873, to re-deliver such bond and mortgage with the satisfaction piece to the mortgages. But in and by said agreements and arrangements it was further provided that if the said company should fail to pay for the reasons therein mentioned the amount due upon said bond and mortgage on or before August 1st, 1873, that then upon certain conditions the payment of such sum should be extended for eighteen months from said first day of August, 1873.

That the last-named company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which long since and on or before February 1, 1875, became wholly due and payable; but wholly failed to pay on or before said last mentioned day, or at any other time, the remainder, being much the larger part of

the sum due upon said bond and mortgage, and has never 113
paid the same, nor any part of the same, and has never completed its raslroad, and has become insolvent and abandoned its undertaking, and is wholly unable to pay the same or any part thereof. The defendant, Daniel Butterfield, was appointed by the Supreme Court of the State of New York Receiver of all its property and effects, on or about the 15th day or April, 1875, and that he has never taken any action whatever towards completing said railroad, or carrying on its enterprise or fulfilling its obligations, but has wholly failed to do so. 114

That during the year 1875 the New York, Boston and Montreal Railway Company executed and delivered a certain mortgage to secure bonds to the aggregate amount twelve million two hundred and fifty thousand dollars to the defendants, Seligman, Sherman and Brown. Said martgage was recorded 15th March, 1873, in Rensselaer County, in Book 138 of Mortgages at page 1, and covered the above mentioned railroad and other things. On the first day of April, 1875, said New York, Boston and Montreal Railway Company executed and delivered 115
another certain mortgage to secure other bonds, to the aggregate amount of twelve millions seven hundred and fifty thousand dollars to the New York Loan and Indemnity Company. Said mortgage was recorded in Rensselaer County, 28th June, 1873, in Book 140 of mortgages at page 21, and conveyed the above named railroad and other things. The said New York Loan and Indemnity Company was a corporation created and then existing under the laws of New York on the 19th April, 1877, and by a judgment of this Court said New 116
York Loan and Indemnity Company was dissolved, and the defendants, William H. Foster. Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, John A. Nichols, Charles H. Dewing, Timothy Cornwall, John H. Cheever, Henry A. Tweed and one Reuben W. Van Pelt, and one Andrew McKenney, who have since died, were its directors at the time of such dissolution.

That enough of the bonds of the said last two mort-

117 gages were sold in Europe to realize six millions of dollars, which was received and disbursed by the defendants, Seligman and Brown, under Exhibit 20.

That afterwards a bill was duly filed in the Court of Chancery of the State of Vermont, where a portion of the mortgaged premises are situated, for the foreclosure of said mortgage by Hull and Lincoln for $5,000,000 against the defendants, James C. Hull, Malissa A. Hull, his wife, Charles G. Lincoln, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as
118 Receiver of the property and effects of the New York, Boston and Montreal Railway Company. Subpænas duly issued therein with the said bill were duly served upon said defendants and such proceedings were afterwards had therein that in the year 1883 a decretal order was entered therein foreclosing said mortgage and directing a sale of the whole of said mortgaged premises, and that that this plaintiff and other like bondholders are entitled to have said sale proceeded with for their benefit and on their behalf.

119 That the said railroad hereinafter described was operated by and on behalf of the New York, Boston & Montreal Railway Company until sometime in November, 1873, when said company leased the said railroad to the Central Vermont Railroad Company, by which it was operated until the 20th August, 1877, when it withdrew from the possession of and abandoned the same.

That in the meantime the said New York, Boston and Montreal Railway Company had failed to fulfill
120 its obligations and became insolvent and abandoned its enterprise as hereinbefore found, and said Lebanon Springs Railroad when surrendered and abandoned by its lessees, lay unoccupied and unoperated until sometime in September, 1877, when it was taken possession of by one Russell C. Root.

That the possession of said road was subsequently delivered by said Root to a coporation called the "Harlem Extension Railroad South Coal Transportation Company," a corporation which was organized under the gen-

eral manufacturing laws of New York by said Root, who 121
was its first president and continued to be its president until said road came into the possession of John W. Van Valkenburgh as Receiver as hereinbefore stated.

That on the twe'y-seventh November, 1877, said Root delivered possession of said property to said last-named company, which continued in possession of an operating the same until said road came into possession of John W. Van Valkenburgh, as hereinafter stated.

That on the seventh September, 1880, one Marvin Sackett, who claimed to be the owner of bonds, issued by 122
said Lebanon Springs Railroad Company, to the amount of $8,700, brought an action in this court against the said Russell C. Root and the said Harlem Extension Railroad South Coal Transportation Company, and also against the said New York, Boston and Montreal Railway Company, and against the said Daniel Butterfield as its Receiver,

In his complaint he alleged that he brought the action
"in behalf of himself and all others, bondholders of the 123
"Lebanon Springs Railroad Company, similiarly situ-
"ated, who hold any of the two millions of dollars of the
"bonds of the Lebanon Springs Railroad Company,
"hereinafter referred to, and who shall be entitled to
"avail themselves of the benefit of this suit."

He prayed for the sale of the whole of the said railroad property and franchises.

He alleges in his complaint the fact of the mortgage to secure his bonds among others to the Union Trust
Company of New York, its actions to foreclose, the sales 124
under them, and the non-payment of the purchase money.

He did not make the Union Trust Company of New York a party to the action.

He alleged in his complaint the aforesaid sales to Hull and Lincoln and their mortgage to Park and Duncan as aforesaid, and their conveyance to the New York, Boston and Montreal Railway Company as aforesaid. And that

125 Hull and Lincoln and Park and Duncan acted throughout all those matters as the "agents" and the "representative" and "for the use and benefit," and for the "sole benefit and advantage" of the Lebanon Springs bondholders; and that the mortgages was given to Duncan and Park "for" those bondholders, and that Park and Duncan held the property as "trustees" for those bondholders. He did not make either Park or Duncan or Hull or Lincoln parties to the action. He did not make any of the trustees under the two mortgages for
126 twenty-five millions of dollars parties to the action, nor the trustee of the aforesaid mortgage to the Harlem Extension Railroad Company.

The summons and complaint in that action were served upon the New York, Boston and Montreal Railway Company, 7th September, 1880, and upon Daniel Butterfield as such Receiver, 23rd September, 1880. They both made default and have never done anything.

The summons and complaint was served upon Russell C. Root and the Harlem Extension Railroad South Coal
127 Transportation Company, 7th September, 1880. They put in joint answers 25th September, 1880, which are in evidence.

The plaintiff did not bring the action to trial until the tenth of October, one thousand eight hundred and eighty-four.

He proceeded as follows:

On the first of October, 1880, he moved for the ap-
128 pointment of a Receiver, which motion being opposed by nobody, was granted, and John W. Van Valkenburgh was appointed.

This order was filed 7th October, 1880, and Van Valkenburgh's bond was filed 11th October, 1880, Root and the Harlem Extension Railroad South Coal Transportation Company abandoned the road. On the twenty-fifth October, 1880, Van Valkenburgh proceeded to borrow twenty-five thousand dollars without giving any notice to anybody. On twelfth November, 1880,

one Bloodgood and six others claiming to own a majority 129
of the Lebanon Springs bonds, and who did own more than three hundred thousand dollars of the same, noticed a motion to be made parties to the action. This motion was heard on the 27th November, 1880, and was opposed by the plaintiff and denied, The decision was made on the 28th December, 1880; an order was made and entered on the 10th day of January, 1881. The order denied the motion, and directed the plaintiff to serve copies of all papers and notices of every kind on one F. L. Westbrook, who, by the order was authorized and al- 130
lowed to appear as counsel in behalf of the said Bloodgood and the other six bondholders, who had joined in the petition "upon all trials, hearings and motions."

Said Westbrook finally declined to act, and so finally declined before the hearing upon the order for certificates of 2d April, 1881.

On or about the sixth November, 1880, said Park and Duncan made application to the Court to be made parties to the action. They alleged that they were the owners of over $300,000 of Lebanon Springs bonds and 131
over $600,000 of Harlem Extension bonds, and that they were the mortgagees under the mortgage made by Hull and Lincoln which the complaint alleged they held as trustees for the Lebanon Springs bondholders. The application for the granting of this petition was opposed by the ptaintiff, was heard on the 27th November and 10th December, 1880, and was not granted.

One Henry A. Tilden, who claimed to own thirty Lebanon Spring bonds, was associated with the said 132
Sackett in the bringing of the action. He retained the Hon. Hamilton Harris as counsel therein, and assumed to control the action.

The application of Bloodgood and the six others, was ended on the 10th January, 1881. On the 23rd February, 1881, the Receiver vertified a petition to the Court in form for instructions. But with a suggestion that he issue certificates to be made a first lien for among other things, the "settlement of unavoidable in debtedness of

133 the company now existing." He noticed this pertition for hearing for the 5th March, 1881.

On the 5th March, 1881, the plaintiff not appearing an order was made appointing one Jones, an expert, to examine the railroad. Said Jones made his report 19th March, 1881. On the 2nd April, 1881, the report of the said Jones was presented to the Court by the Receiver, when, after hearing two counsel for the Receiver and nobody else appearing, the Receiver was ordered to issue certificates of indebtedness to the amount of
134 $350,000, to bear interest at six per cent., and to be a first lien upon the property. The order also appointed one Strait Referee to "hear and determine *all existing* "*claims* against said Lebanon Springs Railroad Com- "pany." This order was filed 4th April, 1881.

The Receiver got his first money on the 10th May, 1881. On the 20th April, 1881, the plaintiff, Sackett, prepared a petition in which he says he was "obliged to "collect, classify and arrange all the complication of "facts and place them in the hands of his counsel for
135 "the purposes of preparation to bring the said action," and he asked for $796.80 for himself, and something for his counsel.

This was presented to the Court on the 28th April, 1881, with notice to the Receiver. And the Court ordered the Receiver to pay the plaintiff, Sackett, $796.80, and to pay the plaintiff's attorneys $1,200.

On the 18th May, 1881, one Andrews, who had been one of the Receiver's counsel upon the application for
136 the order for the certificates 2d April, 1881, presented a petition asking to pay for his services. This was presented to the Court on the 20th May, 1881, and the Court ordered the Receiver to pay to said Andrews $3,000. On the sixth of June, 1881, the Receiver presented a petition to the Court praying for his compensation, and the Court made an order allowing him five per cent. upon all sums received and disbursed.

On the 28th June, 1881, one Carpenter, appearing by the attorneys for the plaintiff, Sackett, presented a

claim to the Referee Strait, for $35875, for "services 137
"rendered at the special instance and request of the
"said Lebanon Springs Railroad Company." The
Referee gave him judgment for that sum.

On the 28th June, 1881, the plaintiff, Sackett, presented, another claim to the Referee Strait, for $2,222.34, and interest for services rendered "at the special instance "and request of the said The Lebanon Springs Railroad "Company." This claim the Referee, on the 30th of June, 1891, allowed at $3,000.04.

One, William F. Taylor, presented a claim against the 138
Lebanon Springs Railroad to the Referee, Strait, who allowed it at $2,500.

On the 29th June, 1881, the said Henry A. Tilden presented, through the attorneys for the plaintiff, Sackett, a claim for $25,267.37 against the former Lebanon Springs Railroad Company for moneys expended at its request, after the making of the $2,000,000 mortgage. This claim the Referee allowed on the 5th July, 1881, at the whole amount. 139

From this time forward none of the defendants ever appear or do anything in the action. And the plaintiff does nothing until the 23d September, 1884.

On the 23d September, 1884, plaintiff's attorney noticed the case for trial for the 10th of October, 1884.

On the tenth of October, 1884, a trial was had between the counsel for the plaintiff, counsel for the Central National Bank of Boston, and other holders of certificates, and the Hon. Hamilton Harris, who had been 140
retained by the said Henry A. Tilden for the plaintiff, and had also received from the said F. L. Westbrook authority to represent him.

As a result the Court found among other things that Hull and Lincoln held the title as trustees for the bondholders, although neither was a party to the action, and judgment was rendered directing the sale of all the railroad and property in New York, subject to the principal of the receiver's certificates, and directing the purchase

141 money to be applied in payment, first, of certain counsel fees and expenses of the receivership, and next, the interest due on the receiver's certificates, and directing any balance to be paid into Court.

This was entered 27th January, 1885. The Referee, after adjourning the sale three times, sold to the defendant Foster, as trustee for $155,000. This amount of $155,000, had been made up by the Receiver on the 2d June, 1885, and was composed of the following items: Counsel fees, $27,299.21; Interest on certificates, $64,-
142 156.66; Receiver's commissions, $15,851.56; Taxes, $2,290.55, and debts of the receivership the balance.

That said Trenor W. Park died intestate 13th December, 1882, and defendant McCullough was duly appointed administrator of the goods, chattels and credits which were of said Trenor W. Park, and filed his bond and accepted, and is acting.

That in 1886, the defendant, the Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated
143 at par of the principal of the same, brought an action in this Court against the defendants, Foster, Hazard, the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company. That in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates. That action was removed into the Circuit Court of the United States and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a Master
144 of that Court for the payment of the said certificates. Under that decree the railroad and property are advertised for sale.

That the New York, Rutland and Montreal Railway Company is wholly insolvent and its credit entirely exhausted.

II.—The said action wherein said Marvin Sackett was plaintiff, was commenced at the request and with the concurrence of the following holders of the followings

bonds of the Lebonon Springs Railroad Company, 145
amounting to about twelve hundred thousand dollars at their face value stated at the par value of the principal of the same, and counsel retained and acting for the said bondholders to the amount of about $1,200,000, drew the original complaint in said action at the request and with the concurrence of said bondholders including said Marvin Sackett.

One Edward Crane was the owner of such bonds and was represented in the said Sackett suit, at its beginning; and during the pendency of the said action, wherein 146
Marvin Sackett was plainitff, was the owner of said bonds issued by the Lebanon Spring Railroad Company, amounting to $700,000 face value stated at par value of the principal of the same. Said Edward Crane, while holder of such bonds, was consulted in regard to said suit, and was represented, in the said Sackett suit, by the attorney and counsel who conducted the said suit in the name of said Sackett, down to the time of its termination.

The following other persons, owners of said Lebanon 147
Spring bonds, were also associated with said Sackett in said Sackett suit and were represented in the said suit by the attorney and cousel who conducted the said suit in the name of said Sackett down to the time of its termination.

Samuel J. Tilden who owned $150,000 of bonds face value; Aaron J. Vanderpool and George W. Quintard as the executors of the last will and testament of Oliver Charlick who owned $62,000 of bonds, face value; Henry 148
Blood, who owned $10,000 of bonds, face valne; one Delancy, who owned $25,000 of bonds, face value; Augustus Schell, who owned $75,000 of bonds, face value; Henry A. Tilden, who owned $30,00 of bonds, face value; the estate of Moses Y. Tilden, which owned less than $30,000 of bonds, face valve; the estate of Horace F. Clark, John W. Van Valkenburgh, who owned $42,200 of bonds, face value; John L. Melchor, who owned $30,000 of bonds, face value; William H. Brower,

149 who owned $10,000 of bonds, face valve ; L. G. Fisher, who owned $10,000 of bonds, face value ; Ira Thorn who owned $5,000 of bonds, face value ; J. Hendricks, who owned $10,000 of bonds, face value ; F. E. Blanchard, who owned $5,000 of bonds, face value, in possession of Hon. Hugh McLellan ; the town of Petersburgh in Rensselaer County, which owned $20,000 of bonds, face value.

III.—That the Receiver Van Valkenburgh received from the certificates two hundred and thirty-six thousand
150 five hundred dollars ($236,500) and no more.

IV.—That he paid as follows :

Plaintiff Sackett.....	$769 80
" "	3,000 04
Carpenter.....	358 75
Taylor.....	2,500 00
Tilden.....	23,967 36
	$30,622 97
151 Counsel.....	$39,203 50
Referee.....	518 20
Receiver.....	22,422 91
Interest on Certificates.....	21,009 27
	$115,807 04

V.—That the suit of Sackett against Root was neither brought nor conducted for the purpose of realizing the property to the owners of the said Lebanon Springs bond.

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VI.—That it was brought and conducted for the purpose of realizing out of the property certain individual claims of the said Sackett and Tilden, in preference of and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property and were behind the mortgage.

VII. That there is now to wit : The tenth of November, 1891, due and unpaid upon the mortgage for five millions of dollars given by Hull and Lincoln to Park

and Duncan, the sum of $4,192,922.95, with interest from 153
first of January, 1875, and that there is now due upon the mortgage to Brown, Seligman and Sherman at the New York Loan and Indemnity Company the sum six millions of dollars with interest from January 1, 1875.

And the following

Conclusions of Law.

1. That by reason of the non-payment of the purchase money under the judicial sales in 1873, Hull and Lin- 154
coln took but a naked title in trust for the Union Trust Company as trustees for both the Lebanon Springs bondholders and the Harlem Extension bondholders and by their mortgage to Park and Duncan conveyed but that naked title in trust.

2. That Duncan and McCullough, as administrator of Park, hold the bond and mortgage so made to them by Hull and Lincoln, impressed with the trust in behalf of the Union Trust Company as such trustee, to the extent of the whole amount due upon it as hereinbefore found. 155

3. That the plaintiffs and all the other owners of Lebanon Springs and Harlem Extension bonds and the Union Trust Company of New York as trustee, are entitled to have the aforesaid foreclosure judgment and decrees of 1872 now enforced, and the said mortgage of Hull and Lincoln to Park and Duncan now foreclosed; and all the property and franchises described in the complaint sold under and by virtue of the said judgment and decrees, and the power of sale in said mortgage, to realize 156
the said sum of $4,192,922.95 and interest, and that the persons entitled under the mortgage made to Brown, Seligman and Sherman, and the New York Loan and Improvement Company, are entitled to all the proceeds of the sale, beyond the said sum of $4,192,922.95 and interest up to the amount due upon these mortgages respectively, and to the balance, if any, the defendant Butterfield, as receiver, is entitled.

4. That the action brought in this Court by Marvin

157 Sackett was not a representative action, for the reason *first*, that it was not so in fact nor intended to be, and *second* because the Union Trust Company was not made a party; and inasmuch as upon the face of the records of this Court it professes to be the action of these plaintiffs, and all other owners of Lebanon Springs bonds and to sell and dispose of all their interest and that of the Union Trust Company in the property and franchises, the plaintiffs and all the other holders of such bonds and the Union Trust Company are now entitled to the judgment
158 and all the proceedings in that suit including the sale and the deed by the Referee to the defendants, Foster and Hazard reviewed and reversed, and all the property and franchises described in the complaint, together with all the interest therein of all the parties to this suit and of all Lebanon Springs and Harlem Extension bondholders sold for the purposes above stated.

That the holders of the certificates issued by the Receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds,
159 which were, in the trial and judgment in the said suit of Marvin Sackett, represented by counsel actually retained by their owners.

6. That the plaintiffs have costs of this action and an additional allowance of two thousand dollars, this being a difficult and extraordinary case.

And I direct judgment as follows:

Perpetually enjoining in the usual form all suits, similar to this, by any Lebanon Springs or Harlem Ex-
160 tension bondholders or by the Union Trust Company, their agents, attorneys and servants.

Perpetually enjoining in the usual form, all suits to enforce any lien upon or to effect any of the property or franchises or any interest therein by any of the holders of certificates issued by the Receiver, Van Valkenburgh, their agents, attorneys and servants.

Adjudging that all the franchises and powers described in the complaint are in full life and vigor, and none of them lost or lapsed,

Adjudging in the usual form of a decree upon a bill of review, that the judgment and all proceedings in the suit brought by Marvin Sackett, including the sale thereunder and the Referee's deed, be now reviewed and reversed, and perpetually enjoining the sale in the suit by the Central National Bank of Boston. 191

Adjudging that the judgment and decrees of 1872 be now enforced.

Appointing a Referee to sell all the said property and franchises with the usual diretions upon foreclosure sales and to distribute the proceeds, and to execute the usual deed to the purchaser and adjudging that the defendants Duncan and McCullough as administrator execute a similar conveyance as to the said property, franchises and powers, and that the Referee report the fact and the facts of his own sale to the Court. 162

Barring and foreclosing in the usual form all parties to this suit and all Lebanon Springs and Harlem Extension bondholders.

Continuing the Receiver until the delivery of the Referee's deed and its confirmation by the Court and directing him then to deliver possession to the purchaser. 163

Appointing a Referee in the usual form to determine upon the evidence already taken and the findings, and the proofs upon which the order was made 25th April, 1891, upon motion of S. A. Rockfellow and others, and such other evidence as shall be presented, who are the owners of the said Lebanon Springs and Harlem Extension bonds and receiver's certificates, and which of said bonds were actually in Sackett's suit, together with the amount paid thereon; with special directions that the evidence already taken and the findings hereinbefore made shall not be conclusive as against any person not a party to this suit, upon the question as to whether his bonds were actually in Sackett't suit, with the nsual directions as to the giving of notice. 164

With the direction usual in a final decree, that any party may apply to the Court at the foot of the judgment.

165 And it appearing to the Court that due notice has been given to Schuyler A. Rockfellow, Esq., attorney for himself and for Erastus Corning, Frederick H. Lawrence, John L. Lawrence, George N. Lawrence, James W. Walsh, Henry E. Tremain and Mason W. Tyler of the appiication for this judgment at this time and place,

It is now, on motion of Campbell & Paige, attorneys for the plaintiffs, adjudged:

That the various computations of the amounts due and
166 proofs of the facts and circumstances taken as aforesaid be and are correct and true and confirmed.

That none of the powers and franchises hereinafter stated to have been conferred upon or enjoyed by eitner the Lebanon Springs Railroad Company or the Vermont and New York Railroad Company have expired, lapsed or been lost, but all are in full force and vigor.

That all owners of any of the bonds hereinbefore described, issued, either by the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company
167 and each of them, and the Union Trust Company of New York, and their and each of their officers, agents, servants and attorneys are hereby perpetually enjoined and and restrained from bringing and from proceeding with any action similar to this, and any action under either of the aforesaid mortgages, made by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company whatever, and from suffering any such action to be brought or to be prosecuted or to be proceeded
163 with in the names of any of them.

That all owners of any of the certificates hereinbefore described as issued by the Receiver, Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffer-

ing any such action to be brought or to be prosecuted or 109
to be proceeded with in the names of any of them.

That the judgment in the action above-mentioned brought in this court by the defendant, Marvin Sackett, against Russel C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company, and Daniel Butterfield, its Receiver, entered in Rensselaer County, and dated January 12th, 1885, and all orders and proceedings in that action, and the sale by the Referee under such judgment, and the deed of the Referee under such 170
judgment, and pursuant to such sale, to the defendants Foster and Hazard, be and they hereby are reviewed and in all things reversed, vacated, set aside and held for nothing.

That the defendants, The Central National Bank of Boston. Peter Butler as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. 171
Loutrell, Louisa M. G. Wright, Francis A White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and the American Loan and Trust Company, and all other owners of certificates issued by the said Van Valkenburgh as receiver as aforesaid, and each of them, and their, and each of their officers, agents, servants, and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, the Central Na- 172
tional Bank of Boston, against the defendants, Hazard, Foster, the New York, Rutland, ~~Boston~~ and Montreal Railway Company, and the American Loan and Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sales to proceed in ~~this or any of~~ their or any of their names or behalf.

That the judgment and decrees of 1872 be now enforced.

173 That all the premises, property, franchises and powers hereinafter described be sold together and not separately at public auction in the county of Rensselaer by or under the direction of John L. Henning, of Saratoga Springs, Counsellor at Law who is hereby appointed as Referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that either or any of the parties to this action may purchase at such sale; that the referee execute to the purchaser or purchasers a deed of
174 the property, premises, franchises and powers sold; that out of the monies arising from such sale after deducting the amount of his fees and expenses upon such sale, and any lien or liens upon the same for taxes, he pay to the plaintiffs or their attorneys the sum of eighteen hundred and seventy-five dollars, hereby adjudged to the plaintiffs for their costs, together with the sum of two thousand dollars allowed to the plaintiffs by the Court for an additional allowance.

That there shall be paid in cash at the time of the
175 sale such amount as the referee may direct, and at the time of the delivery of the deed the balance of the purchase money.

That the referee after the payment of the amount of his fees and expenses and the taxes and costs as aforesaid, shall pay to the holders of the Lebanon Springs bonds the amount found to be due upon their respective bonds, as it shall be established by the report of such referee, confirmed by the Court, except that as to the portions coming to the owners of such bonds as were in the
175 Sackett suit, as the same shall be found by such report so confirmed, he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy the same, as the same shall be found by the said report so confirmed, and the balance to the holders of such bonds.

And he shall pay the remainder of such purchase price, if any, into Court.

The aforesaid sale shall be made subject to a debt which the receives has been authorized to contract to the

amount of Twenty thousand dollars, and to no other lien or charge whatever. 177

That the Referee make a report of such sale and file it with the Court with all convenient speed; that if the proceeds of such sale be insufficient to pay the several amounts so reported due as aforesaid, the said Referee specify the amount of such deficiency in his report of sale, and that the defendant the New York, Boston and Montreal Railway Company, pay the same; and that the purchaser or purchasers be let into possession on production of such deed, and a certified order confirming the report of sale. 178

That the defendants, William Butler Duncan, and John G. McCullough as administrator of the goods, chattels and credits of Trenor W. Park, deceased, under the direction of said Referee, execute and deliver to the purchaser or purchasers a deed of all such property, premises, franchises and powers, and in conformity with the power of sale contained in the mortgage from Hull and Lincoln to Park and Duncan. and that the Referee specify the same in his report. 179

That the defendants and all persons claiming under them or any or either of them, after the filing of the aforesaid notice of the pendency of this action, be and are hereby barred and foreclosed of all right, title, interest and equity of redemption in the said premises, property. franchises and powers so sold, or any part thereof.

That the receiver be and is continued until the delivery of the referee's deed and its confirmation, and that he then deliver possession to the purchaser and account to the Court. 180

That the Referee ascertain and determine, and report from the evidence already taken upon this trial and the above tidings, and the proofs upon which the order was made, 25th April, 1891, upon motion of S. A. Rockfellow and others, and such other evidence as shall be furnished him, who, other than the plaintiffs, are the holders of the said bonds issued by the Lebanon Springs Railroad Company, and the Harlem Extension Railroad Com-

181 pany, and which of them were in the trial and judgment in the said suit brought by Marvin Sackett, represented by counsel, actually retained by said holders, and that upon such ascertainment, determination and report, the aforesaid evidence and proofs and findings shall not be conclusive as against any person who shall appear upon such reference and who is not now a party to this suit, upon the question as to whether his bonds were actually in the said suit brought by Marvin Sackett; that the said Referee also ascertain, determine and report from
182 the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of the said certificates issued by the Receiver Van Valkenburgh, and how much has been paid upon said certificates, and the said Referee is hereby authorized and directed to give notice by advertising in two daily newspapers published, one in the City of Troy called the *Troy Press*, and one in the city of New York called the *New York Tribune*, requiring the said holders of said bonds and said certificates, to produce the same before
183 the said referee at his office in Saratoga Springs or such other place and at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon, and the said referee is also authorized and directed to report what would be the just proportion and amount for the said other holders of said bonds to contribute to the expenses of the suit.

The following is a description of the said premises, property, franchises and powers:

184 All the franchises and powers conferred upon the Lebanon Springs Railroad Company, by the following acts of the Legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An Act to authorize the Lebanon Springs Railroad "Company to construct an extension of its road into "Massachusetts and Vermont, and to provide means "therefor," passed March 8th, 1853, and being Chapter 25 of the Laws of that year;

"An Act to amend an Act entitled "An Act to 185
"to authorize the Lebanon Springs Railroad Company
"to construct an extension of its road into Massachusetts
"and Vermont, and to provide means therefor," passed
"March 8th, 1853," passed June 24th, 1853, and being
Chapter 461 of the Laws of that year;

"An Act to enable certain connecting railroad com-
"panies to aid in the construction of the Lebanon
"Springs Railroad," passed April 12th, 1885, and being
Chapter 350 of the Laws of that year;

"An Act to extend the time for the completion of the 186
"Lebanon Springs Railroad," passed March 23d, 1857,
and being Chapter 150 of the Laws of that year;

"An Act to extend the time for the completion of
"the Lebanon Springs Railroad," passed April 12th,
1860, hnd being Chapter 285 of the Laws of that year;

"An act to extend the time for the completion of the
"Lebanon Springs Railroad," passed April 22, 1862, and
being Chapter 444 of the laws of that year;

"An Act to amend the charter of the Lebanon Springs 187
"Railroad Company," passed April 9th, 1864, and being
Chapter 145 of the Laws of that year;

"An Act to authorize any town in the Counties of
"Columbia and Rensselaer to aid in the completion of
"the Lebanon Springs Railroad," passed April 4th,
"1866, and being Chapter 373 of the laws of that year;

"An Act to extend the time for the completion of
"the Lebanon Springs Railroad," passed 26th February,
1867, and being Chapter 46 of the laws of that year; 188

And all the powers and franchises of railroad corporations stated in "An Act to authorize the formation of railroad companies, and to regulate the same," passed by the Legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto, and the power to purchase, construct and operate the railroad hereinafter described, extending from Chatham Four Corners, in the County of Columbia, northerly through

the Counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also the certain other special and particular powers and franchises stated in the above Acts, and also the following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the managing of the business thereof, which it might be done if that part were within the State of New York.

To create preferred stock at such a rate of dividend, or interest, and with such securities therefor, as may be deem expedient.

To extend the road by construction or purchase into the States of Vermont and Massachusetts as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate either alone, or after consolidation with any company into a single corporation, with any company having a railroad or the right to construct a railroad which, or a portion of which, should be within the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in an Act entitled "An Act to authorize the consolidation of certain railroad companies," passed by the Legislature of New York, April 2d, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which it might be constructed or acquire within the States of Vermont and Massachusetts as may be exercise if the same were wholly within the State of New York.

To have corporate stock and bonds taken and owned or 193
guaranteed by any company having or being authorized to construct a railroad connecting with the lines of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of its railroad from the Massachusetts State line as declared in its articles of 194
association of the Lebanon Springs Railroad Company to any point within the town of Hoosick, in the County of Rensselaer, or the town of White Creek, in the County of Washington.

To construct a branch to a terminus at the Vermont State line at a point of junction with the Western Vermont Railroad, now known as the Bennington and Rutland Railway.

To construct a branch with a terminus in either or 195
both of the cities of Albany and Troy, with the same effects as if the line had been originally fixed in the articles of association both as to the main line and branches as the same are last above described, and the termini thereof had been its original terminus.

Also all powers and franchises conferred by the following acts which were duly passed by the Legislature of the State of Vermont, to wit:

"An Act to incorporate the Vermont and New York 196
"Railroad Company," approved November 2, 1865, and being No. 134 of the laws of that year:

"An Act to amend an Act entitled 'An Act to incor-
"'porate the Vermont and New York Railroad,' approved November 2d, 1856," approved November 19th, and being No. 167 of the laws of that year:

"An Act authorizing the Bennington and Rutland
"Railroad Company to consolidate their road with the

"road of the Lebanon Springs Railroad Company," approved November 21st, 1867, and being No. 155 of the laws of that year;

"An Act to enable the Bennington and Rutland "Railroad Company to aid in obtaining necessary rail-"road connections," approved March 28th, 1867, and being No. 2 of the Special Sessions of that year;

And the powers and franchises of railroad corporations under the laws of Vermont, and the powers and franchise to build, own and operate a railroad from Bennington to the Vermont State line, being that portion of the railroad hereinafter described, which is in the State of Vermont, and to transfer and convey such powers and franchises and any property and to consolidate with railroad companies.

And also the following described property, to wit:

All and singular the tracks or roadway of the Lebanon Springs Railroad, from Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in the town of Hoosick, in the County of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said the Lebanon Springs Railroad Company already built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same, and of all of the above mentioned powers and franchises; and also all the rolling-stock, locomotives: tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York Railroad, constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the vil-

lage of Bennington, in the State of Vermont, including all the equipment and all the above mentioned powers and franchises of the said Vermont and New York Railroad Company belonging to or in any wise appertaining to, or which may at any time belong to or appertain, to have belonged to or appertained to the same or either of said railroads or companies, as well in law as in equity; including also all property of every kind, name or nature of, or purchased by or now or heretofore in the possession of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company, and John W. Van Valkenburgh as receiver, and William V. Reynolds, as receiver, and including also all property, powers and franchises of every name or nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867.

That all of the powers and franchises hereinbefore enumerated, stated or referred to are now possessed and enjoyed by the defendant, the New York, Boston and Montreal Railway Company, and are hereby ordered to be sold as aforesaid.

That any of the parties to this action and also the referee hereinbefore appointed, and the receiver, may hereafter apply to the court for such further order or directions as may be proper at the foot of this judgment, and the said receiver is hereby for such purpose made a party to this action without prejudice to any proceedings heretofore taken in the action.

Enter in Rensselaer County.

JOHN R. PUTNAM,
J. S. C.

D. E. CONWAY,
Clerk.

205 STATE OF NEW YORK,
City of Troy,
County of Rensselaer,
Clerk's Office.

I hereby certify, that I have compared the annexed copy of judgment with the original thereof filed in this office on the 11th day of Nov., 1891, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my
(SEAL) hand and affixed my official seal this
206 11th day of Nov., 1891.

D. E. CONWAY,
Clerk.

(*From the Record, folio 3022 of printed book.*) 207

STEVENS and others *against* UNION TRUST COMPANY and others.	Opinion.

PUTNAM, *J.*: A careful examination of the opinion of the General Term (57 Hun, 499-515) leads to the conclusion that that Court has disposed of this case, 207a leaving nothing for me to do but direct judgment in pursuance of such opinion. Whatever my views might be I must, of course, be guided by the decision of the Appellate Court.

The case being important I thought of writing an opinion stating my views, but the opinion delivered at General Term covers the whole case and renders one by me unnecessary and improper.

Whatever the action may be called—whether a "Bill of review" or otherwise—the General Term has held it properly brought, and that the action is not barred by any laches of the plaintiff or any 207b statute of limitations (57 Hun, 515). The Court states (page 509): "A bill of review impeaching the "action and judgment for fraud brings the fraudu- "lent practices of the plaintiff or suffered by him "in the action, whereby he wronged those he "assumed to protect. Such is this action. It is a "direct attack, not upon any alleged error of the "Court, but upon the fraud of the plaintiff."

The Appellate Court has also held that the "Sackett" action was not a representative one. The opinion of the General Term was delivered on the reversal of the judgment of the Special Term of the law and facts.

208 The Court remarked in reference to the finding of the Special Term: "The conviction is forced upon "our minds that the finding cannot be sustained "and that the findings requested by the plaintiff, "namely, 'That said suit of Sackett against Root "was neither brought nor conducted for the purpose "of realizing the property to the owners of the "Lebanon Springs bonds,' ought to have been "made.

"Assuming that Sackett, and Tilden, his asso- "ciate, in bringing and conducting the action con- "templated the natural and probable consequence
209 "of their management of the action of Sackett *vs.* "Root, they cannot be acquitted of deliberate "spoliation of the Lebanon Springs bondholders.

"What has already been said suggests the delicate "and highly responsible trust which a representa- "tive plaintiff assumes in bringing such an action "as Sackett brought. He impliedly guaranties that "he will not allow his private interest to conflict "with his discharge of duty. Here we find Sackett "and Tilden obtaining from the fund, which it was "their duty to protect for the bondholders, $27,- "764.21 upon their private claims, which, if valid, "were behind the bonds. No suggestion of these
210 "claims was made in the complaint. Presumably "the other bondholders, if they had not been kept "out of the court by the plaintiff's intrusion as "their self-elected representative, would have "opposed their priority." * * * "Not content "to leave out of the action those who would have "naturally opposed these claims, they successfully "opposed and kept out such of them as tried to "come in. Under a pretense of protecting the "common and general interest of the bondholders, "Sackett and Tilden sacrificed them to their own "interests. This was a fraud, and of itself is "sufficient to establish the non-representative char-

" acter of the action and its misrepresentative char- 211
" acter. Sackett's omission to make the Union
" Trust Company, Park and Duncan and the trus-
" tees of the New York, Boston and Montreal Rail-
" way Company parties to the action is significant.
" When a party brings an action for himself he can
" select his own defendants, but when he volun-
" teers to sue as the representative of others, he
" should sue those who ought to be sued.

" If the railroad was to be sold, the common
" interest of the bondholders required that all out-
" standing liens and clouds upon the title behind
" the bonds should be cut off, to the end that there 212
" should be no diminuties of price upon account
" thereof." * * * * * * *

" It would seem to follow that the action by one
" *cestui que trust*, as the representative of all, is
" not proper where the trustee is alive and is not
" brought into court. He who seeks to procure
" the representation of all the bondholders should
" perform the condition precedent to such repre-
" sentation, namely, bring in as a party to the
" proper action their legal representative, their
" trustee. Where the trustee is dead the *cestui*
" *que trust*, through one or more as their repre-
" sentatives, can bring an action, since no trust shall 213
" fail for want of a trustee. (Galveston R. R. Co.
" *vs.* Cowdrey; 11 Wall., 459.) It is plain that
" if the Union Trust Company is not cut off, and
" these plaintiffs are not cut off by the Sackett suit,
" then no bar exists to the present action. * * *
" Unless the plaintiffs can be held to have con-
" sented to the Sackett suit, then whatever rights
" they could work out for themselves under the
" Union Trust Company's judgments, or the Park
" and Duncan mortgage, can be worked out in this
" action, since neither they nor the Union Trust
" Company nor Park and Duncan were parties to

214 " the Sackett action, and all necessary parties were
" made defendants in this action." * * * *
" Such an action, thus instituted, controlled and
" resulting, cannot be upheld. It was not a repre-
" sentative suit in fact; if it was such in form and
" regularity, then it is effectually impeached for
" fraud." * * * * * * *

The Court further says as to the receiver's certificates issued in the Sackett action: " As said in " Union Trust Company *vs.* Illinois Midland Com-
" pany (117 U. S., 460), ' These who take receiver's
" ' certificates must be deemed to have taken them
" ' subject to the rights of parties who have prior
215 " ' liens upon the property, and who have not, but
" ' should have been, brought before the Court.
" ' While the Court, under some circumstances, and
" ' for some purposes, and in advance of the proper
" ' lien-holders being made parties, may have juris-
" ' diction to charge the property with the amount of
" ' the receiver's certificates issued by its authority,
" ' it cannot, without giving such parties their day
" ' in court, deprive them of their priority of lien.
" ' When such prior lien-holders are brought before
" ' the court they become entitled, upon the plain-
" ' est principles of justice and equity, to contest
216 " ' the necessity, validity, effect and amount of all
" ' such certificates, as fully as if such questions
" ' were then the first time presented for determi-
" ' nation.' "

The new evidence given on the trial before me is not important. The material facts upon which the General Term based its decision remains unchanged, as will be seen by these parts of the opinion which I have quoted above.

Therefore nothings remains for me but to direct judgment in pursuance of the holding of the General Term. On the state of facts appearing on the first trial and which also appeared upon the trial,

before me, the Appellate Court determined that the 217
Sackett suit was not a representative one and that the plaintiffs in this action were not bound by the judgment rendered in that suit and were entitled substantially to the relief asked for in their complaint. It is therefore my duty to direct a judgment in pursuance of such holding of the Appellate Court.

It follows that there should be a sale of the property described in the complaint. The proceeds of the sale, after paying the costs of the action, should be brought into court. There should be a reference ordered to determine what bondholders 218
assented to or acquiesced in the Sackett suit, and also as to what bondholders held aloof from the Sackett action and are not bound by the judgment and proceedings therein. The latter are entitled to receive their *pro rata* part of the proceeds of the sale to be made in pursuance of the judgment in this action, the same as if the Sackett suit had never been brought. The share of the proceeds of the sale which would otherwise have been received by the bondholders who acquiesced in the Sackett suit or took part therein, should be paid to those holding certificates issued in the Sackett suit to the extent of said certificates issued. The 219
residue, if any, being payable to Hazard and Foster or their grantees, or rather as this Court may hereafter decree.

Upon a motion to strike the ~~opinion~~ injunction from the judgment, the trial Judge delivered the following opinion:

220 SUPREME COURT.

AARON R. STEVENS and others

against

THE UNION TRUST COMPANY, The Central National Bank of Boston and others.

Opinion.

PUTNAM, *J.*:

221 The facts on the second trial being substantially the same as on the first, in directing judgment herein, I based my conclusion on the holding of the General Term, feeling bound to follow that Court. If the question in the case had not already been passed upon by the appellate tribunal, I might have reached a different conclusion. But, of course, the opinion of the General Term on the same state of facts concluded me.

The effect of my decision therefore was to carry out the judgment of the General Term, and, hence, to determine, in reference to the "Sackett" suit that "such an action, thus instituted, controlled and
222 "resulting cannot be upheld. It was not a repre-"sentative suit in fact; if it was such in form and "regularity then it is effectually impeached for "fraud. The plaintiffs are * * * en-"titled to relief substantially the same as if the "Sackett action had never existed. They were in "no sense parties to that action, and, therefore, "their rights remain untouched. It is said they "are bound by the receiver's certificates which were "declared to be a first lien upon the property. "This cannot be so without a violation of constitu-"tional protection. The Court acquires jurisdiction "of the parties, and of the subject matter before it,

" but, from the nature of the case, can only acquire 223
" jurisdiction of so much of the subject matter as
" all the parties before it hold. * * *
" * * * * * Those who take receiv-
" er's certificates must be deemed to have taken
" them subject to the rights of parties who have
" prior liens upon the property and who have not,
" but should have been, brought before the Court.
" * * * * * The Central National
" Bank of Boston, a large holder of these certifi-
" cates, as plaintiff for itself and all other certificate
" holders, brought an action against Hazard & Fos-
" ter, the purchasers of the railroad, upon the sale 224
" of the Sackett suit and against the New York,
" Rutland and Montreal Railway Company, to
" which company Hazard and Foster conveyed the
" road, and against the American Loan and Trust
" Company, trustees of mortgage bonds issued by
" said railroad company. Judgment was obtained
" against said defendants, establishing the bank's
" ownership of its certificates and their lien upon
" the railway, and providing for the sale of the
" railway to pay the plaintiff and such others as
" should come in and establish their ownership.
" Such a judgment is good against the defendants
" in that action. They derive title to the railroad 225
" under the Sackett sale which preferred the cer-
" tificates. It is not binding upon the plaintiffs."

In pursuance of the decision of the Appellate Court I therefore found that the plaintiffs were entitled to a judgment providing that the Sackett judgment and all the proceedings in that action, including the sale and the deed by the referee to the defendants, Hazard and Foster, be reviewed and reversed, and all the property and franchises described in the complaint, *together with all the interest therein of all the parties to this suit and all the Lebanon Springs and Harlem Extension bondholders, be sold for the*

226 *purposes above stated.* Also holding that the holders of the certificates issued (in the Sackett suit) by the receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds which were in the trial and judgment in the Sackett suit represented.

In this discussion we must assume that my conclusions and findings, based as they are on the authority of the Appellate Court as to the Sackett suit, are correct, and that the Sackett judgment and sale thereunder was properly set aside.

Having reached the conclusion then that the
227 Sackett suit was fraudulent and not a representative action and that the sale thereunder should be vacated and set aside and that the certificates issued in said action are, as to the plaintiffs, invalid and not enforceable, and that there must be a new sale of the property under the judgment in this action, it remains to be seen whether the defendant, the Central National Bank of Boston, should be allowed to proceed with the sale under the certificates issued in the Sackett suit under the judgment in the Circuit Court of the United States.

For what purpose? The sale under the judgment in that action could convey no title. It must
228 be subject to and over-reached by the sale directed by the judgment herein. Yet, being made subsequent to said last-named judgment the effect would necessarily be to cast a cloud upon the title and to embarrass the subsequent sale to be made in this action.

The judgment in the United States Court cannot be interfered with as far as it determines the rights of the Central National Bank to recover the proceeds of the bonds represented in the Sackett suit as against the defendants in the Federal action.

On the sale in this action the bank will receive the proceeds of the bonds represented in the

Sackett suit which would go otherwise to the bond- 229
holders. On the sale so to be made it is to be presumed that the property will bring as high a price, if not higher, as on the sale under the United States judgment; and hence defendants will in fact receive the same proceeds as under the sale in the Federal action. Why, then, should the property be sold in that action, such sale being necessarily overreached by the sale to be made herein and conveying no title?

What would be the effect of such a sale? The General Term holds that the certificates are void as to plaintiffs and all bondholders not represented in the Sackett suit. That the judgment in the Federal 230
action is not binding on such bondholders. That plaintiffs are entitled to relief the same as if the Sackett suit had never existed—that is, a judgment of foreclosure and sale under which a title to the road can be given. What, then, would be the effect of a sale under the Federal judgment in favor of the bank? As stated, such a sale would not give any title to the property. At the most it would convey to the purchasers the interest of the certificate holders who have acquired the interest of the bondholders represented in and assenting to the Sackett action, and who are also represented in the 231
Federal action. But what bondholders? As held by the General Term there must be an identification of those bondholders who held aloof from the Sackett suit, for such are not bound by any proceedings therein and are entitled to the benefit of this action. Therefore if there is a sale under the Federal judgment its only effect will be to transfer to the purchasers the interest of the certificate holders representing the bondholders who were represented in the Sackett action to the proceeds of the sale in this action. But such interest is already preserved and taken care of by the judgment herein.

232 Under the judgment entered in this action under the direction of the appellate Court there can be no sale under the Federal judgment, that is, a sale that will transfer any title to the purchasers.

For the above and various other reasons not necessary to be stated, I think that the clause in the judgment restraining the sale under the Federal judgment should be retained. If the bank has a claim against Hazard and Foster, the purchasers on the sale under the Sackett judgment, for any deficiency—after the judgment in this action setting aside the Sackett judgment and sale—I think they
233 may recover such deficiency as well if the property is sold pursuant to the judgment herein as if sold under the Federal judgment.

It is suggested, however, that the State Court cannot enjoin parties from proceeding in the United States Court in an action or under judgment therein.

There are statements in various authorities that would seem to sustain that position.

Thus, in 2d Story's Equity Jurisprudence, Sec. 900, the author says, referring to the power of the Chancery Court to restrain parties within its jurisdiction from proceeding in foreign courts in certain cases: "There is one exception to this doctrine
234 " which has long been recognized in America; and " that is, that State Courts cannot enjoin proceed- " ing in the Courts of the United States; nor the " latter in the former courts."

Chancellor Walworth, also in Mead *vs.* Merritt, 2d Paige, 402, says: " Although the Court has the " physical power to act coersively on a party " within its jurisdiction to the same extent, it has " frequently decided that it would not sustain an " injunction restraining a suit or proceeding pre- " viously commenced in a court of a sister State; or " in any of the Federal courts. The same principle

" has been adopted by the Supreme Court of the 235
" United States.

Diggs *vs.* Wolcott, 4 Cranch, 179.
McKim *vs.* Voorhees, 7 Cranch, 278.

" And I am not aware that any court of equity in
" the Union has deliberately decided that it will
" exercise the power, by process of injunction, or
" restraining proceedings which have been pre-
" viously commenced in the courts of another
" State."

To the same effect is the case of Rio Grande Rail-
road Company against Gomila, 132 U. S. Rep., 483, 256
the other case cited by defendant.

See Schuyler *vs.* Pellissier, 3 Edward's Chan., 191.
Coster *vs.* Griswold, 4 Edward's Chan., 376.

On the other hand, in Dinsmore against Nere-
sheimer, 32 Hun, 206, the General Term of the First
District enunciates this doctrine: "The principle
" has been regarded and stated as elementary in its
" character, that a court of equity should interfere
" when sufficient equitable reasons are presented
" for doing so, to restrain the prosecution of an un- 237
" conscionable action, although it may be pending
" in the courts of another State or country (Story's
" Eq. Jur., Sec. 899). This may be done without
" interfering with the proceedings themselves, by
" controlling the conduct of the parties when they
" are subject to the jurisdiction of the Court so
" interposing for the prevention of injustice." In
that action an injunction was granted to restrain
the prosecution of an action in the Supreme Court
of the District of Columbia, sufficient equitable
grounds existing therefor.

238 In Dehon *vs.* Foster, 4th Allen, 550, the Court remarked: "The authority of this Court, as a Court "of Chancery, upon a proper case being made, "to restrain persons within its jurisdiction from "prosecuting suits either in the courts of this "State, or of other States, or foreign countries, is "clear and indisputable. In the execution of "this power courts of equity proceed, not upon "any claim of right to interfere with or control "the course of proceedings in other tribunals, or "to prevent them from adjudicating on the rights "of parties when drawn in controversy, and duly
239 "presented for their determination. But the "jurisdiction is founded on the clear authority "vested in the courts of equity over persons within "the limits of their jurisdiction, and amenable to "process, to restrain them from doing acts which "will work an injury to others, and are, therefore, "contrary to equity and good conscience. As the "decree of the Court in such cases is pointed solely "at the party, and does not extend to the tribunal "where the suit or proceeding is pending, it is "wholly immaterial that the party is presenting "his action in the courts of a foreign state or "country."

240 This case was followed in Vail *vs.* Knapp (49 Barb., 308 and 309), Claflin & Co. *vs.* Hamlin (62 How., 284). In Town of Thompson *vs.* Norris (11 Abb. N. C., 171–172), Justice Learned intimates that there may be exceptional cases where an injunction would lie restraining the prosecution of an action in the United States Courts.

See also Burgess *vs.* Smith (2d Barb. Chan., 280), where Chancellor Walworth intimates that in a very special case the rule of comity forbidding the granting of an injunction to stay proceedings in a court of competent jurisdiction of a sister State might not be followed.

In Barry *vs.* Brune (8 Hun, 395, 71 N. Y., 261) 241
an action was commenced to collect an insurance policy and to restrain the enforcement of a judgment obtained by the defendant Brune in the Federal Court as assignee of the policy of insurance; plaintiff obtained a judgment for the amount of the policy and a perpetual injunction against the defendant restraining the enforcement of the United States judgment. This case would seem to determine that in a special case parties might be enjoined from proceeding in the Courts of the United States.

In People *vs.* The Erie Railway Co. (36 How., 132), the defendant was enjoined from delivering 242
its property to a receiver appointed by a United States District Court.

See also Bowers *vs.* Durant, 43 Hun, 348,
Garrison case, 1 How. N. S., 352;
Kettle case, 8 Daly, 72.
Hays *vs.* Ward, 4 John. Chan., 122.

If the judgment of the Central National Bank on the certificates had been in the Supreme Court of the State—being so obtained on certificates issued in an action held to be fraudulent and the judgment and proceedings in which are, so to speak, "wiped 243
out" by the judgment in this action, it would be hardly claimed that a sale on the foreclosure of said certificates, which could convey no title and which would necessarily cast a cloud upon the title of the property under the sale in this action, should be allowed to proceed.

There are cases which hold that where the jurisdiction of the United States is derived from the citizenship of the parties no higher sanctity or effect can be claimed for a judgment of a Circuit Court of the United States than is due to judgments of the

244 State Courts in a like case and under similar circumstances.

See Dupasseur *vs.* Rocherau, 21 Wall., U. S. Rep., 135.
Crescent Live Stock Co. *vs.* Butchers' Union, 120 U. S., 147.

If the doctrine as enunciated in these cases is correct, then the Court could as well enjoin the parties from proceeding to a sale on the judgment in the Federal Court in favor of the Central National Bank as if that judgment had been rendered in the Supreme Court of this State. Especially in a case
245 like this where the action was commenced in the Courts of this State and only removed to the Courts of the United States because of the citizenship of the parties.

With some hesitation I have reached the conclusion under the authority of the cases above cited that in some cases this Court as a court of equity by its judgment may restrain parties from proceeding in the Federal Courts, equity demanding such a judgment. It is true that ordinarily parties in an action in a State Court will not be enjoined from proceeding in the action in the Courts of the United
246 States. This is the usual rule. It may be said to be *the rule.* But there are exceptions to the rule as held in the authorities hereinabove cited.

In 1st High-on-Injunctions, page 92 (note to Sec. 111), the author, referring to the dicta 6th Wallace, 514, says: "While the doctrine as thus stated is "undoubtedly true as regards any effort on the part "of a State or Federal Court to operate by injunc- "tion upon the process of any other tribunal, State "or National, it should be borne in mind that courts "of equity, in the exercise of their extraordinary "powers by injunction, have never assumed to "enjoin the Court itself, but only to arrest the action

" of the parties litigant; and this in the exercise of 247
" a jurisdiction strictly *in personam.*"

Probably the State Courts cannot enjoin proceedings in a Federal Court, nor can a State Court ordinarily enjoin parties from proceeding in a Federal action, but there are exceptional cases where the parties may be so restrained. The cases cited by defendant I think are not quite similar to this. In Riggs *vs.* Johnson County (6 Wall. U. S., 166), an injunction was issued by a State Court to stay proceedings on a judgment duly rendered in a United States Court on the ground that the coupon bonds upon which the judgment was obtained were 248
void under the holding of the State Court, the Federal Court having held them valid. In fact by the action in which the injunction was issued the State attempted to reverse and set aside the holding of the United States Court on questions of law involved in the case. And the Court held: " That " the injunction of a State Court is inoperative to " control or in any manner affect the process or " proceedings of the Circuit Court."

It will be perceived that the action of the State Court in that case was in direct conflict with the United States Court. The cases of the United States *vs.* Keokuk (6 Wall., 514), The Mayor *vs.* Lord (9 249
Wall., 409), Supervisors *vs.* Durand (9 Wall., 415), are similar to that of Riggs *vs.* Johnson County (*supra*), and very clear not like this case. In Rio Grande R. R. Co. *vs.* Gomila (132 U. S., 478), the property of the debtor had been seized under execution on a judgment obtained of the Federal Court, and it was held that probate laws of the State would not *take the property from the hands of the Marshal.* The Court held that it would have been different had there not been any seizure under the United States judgment (pages 484–485). Of course such a decision follows the doctrine that the pro

250 ceedings in the Courts of the United States cannot be interferred with by the State Courts. The Court then through its officers being in the actual possession of the property. The case of Amy *vs.* The Supervisors (11 Wall., 136) is similar to that of Riggs *vs.* Johnson County (*supra*). In McKim *vs.* Voorhies (7 Cranch, 279), it is held that the State Court has no jurisdiction to *enjoin a judgment* in the Circuit Court of the United States. In that case the State Court attempted to enjoin all proceedings in a judgment of ejectment obtained in the Federal Court, thus restraining proceedings on the judgment, not the party.

251 I think that no injunction should be granted by State Courts restraining the enforcement by parties of a Federal judgment where the effect of such injunction is to raise a conflict with the Federal Court. Neither, probably, can proceedings in the Federal Courts be enjoined by a State Court. But authorities above cited seem to hold that in certain exceptional cases parties to an action in a State Court may be enjoined from taking any proceedings under a judgdment in a Federal Court.

Although the doctrine enunciated in some cases cited by defendant, if taken literally, seems differ-
252 ent, yet, such doctrine in each of such cases was stated in reference to the facts of the case before the Court, which, as we have seen, were very different from those in this case.

In this action the authority to issue the certificates, under which the Central National Bank is proceeding in the Federal Court, is an order made in the Supreme Court of this State in the Sackett suit. The same Court in which the Sackett order was entered now vacates and sets aside, as it lawfully may, the Sackett judgment and sale, and all proceedings in that action, except as far as it determines the rights of the Central National Bank and

Hazard and Foster and their grantees as against 253
parties represented in that action to the proceeds of the bonds held by parties so represented.

The Supreme Court, therefore, on setting aside the proceedings in the action under which the Central National Bank received its certificates may properly restrain by injunction that bank from proceeding upon the judgment it obtained upon such certificates.

That bank is striving to enforce certificates issued by the Supreme Court of this state, which that court now adjudges void. It is proper for that court to prevent the bank from selling under a judgment upon the void certificates, which sale would give no 254
title and tend to cast a cloud upon the title of the property to be derived under the sale herein. Such action of the state court is not at all in conflict with the holding of the Federal court. The judgment obtained in that court was in the action by the Central National Bank against Hazard and Foster, their grantees, and the American Loan and Trust Company, as subsequent mortgagees. Said judgment was based on the validity of the Sackett suit and judgment. The question as to whether that was a representative action or a fraudulent one was not involved. The only question in the Federal court 255
was, were the certificates issued pursuant to the order of the state court in the Sackett suit and was the plaintiff the owner of such certificates. No question raised in this action was involved in that. The judgment in this action raises no issue with the Federal court. That judgment was to enforce the certificates of this court, which this court now vacates with the proceedings and judgment in the action in which they were issued.

Hence this case is one where, in the language of the counsel for the defendant, "*something has arisen since the rendition of the Federal judgment to render its enforcement inequitable.*" It is true

256 that the judgment of the Federal court has not been reversed; but the certificates on which that decree was based are by the judgment entered in this action, and hence since the Federal judgment was obtained, with the proceedings in that action, "wiped out." Since the Federal judgment a judgment has been duly entered in the state court that avoids as against the plaintiff and parties to this action the certificates on which the Federal judgment was based and renders a sale thereunder inequitable and ineffectual to convey any title.

In fact, in my opinion, the effect of the judgment for the resale of the property and the vacating the
257 decree, and sale thereunder, in the Sackett suit renders an injunction of the sale under the certificates issued in the Sackett suit not only proper but necessary. If this court cannot award such an injunction it could not render the judgment given in this case. Such an injunction is a part of the relief the plaintiff is entitled to, if entitled to any judgment. To vacate the Sackett judgment and sale and proceedings on the ground that the action was not a representative one or was fraudulently conducted and yet to allow, under certificates issued in that action, defendant to sell the property would not be reasonable or proper.

258 I think, therefore, that the motion should not be granted. I presume that no order is necessary to be entered. The matters discussed on this motion might properly have been discussed before the rendition of judgment, and hence no costs should be allowed.

As to the $2,000 allowance to the plaintiff I thought, considering the amount involved and the necessary labor in the case that such allowance was not excessive. But, of course, if desired, the parties should be heard in the matter, and I am willing to hear any suggestion in that regard. Possibly other parties are entitled to some allowance.

(*From the Record, folio 3044 of printed book.*) 259

At a General Term of the Supreme Court, held in and for the Third Judicial Department, at the City Hall in Albany, on the 9th day of May, 1893.

Present—Hon. STEPHEN L. MAYHAM, *P.J.*
Hon. D. CADY HERRICK, *J.*

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, ANDREW A. DOUGLAS, as Trustee, etc., and IDA S. HARRISON, 260
Plaintiffs,

against

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and others,
Defendants.

An appeal from the judgment entered in Rensselaer County in this action, on the 11th day of November, 1891, having been taken to the General 261
Term by the defendant, the Central National Bank of Boston, Peter Butler, as receiver; the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, it is now, after hearing Mr. Hale for the aforesaid appellants, and Mr. Paige for the respondents,

Ordered that said judgment be and is in all things affirmed, with costs.

JAMES D. WALSH,
Clerk.

Filed in Rensselaer County.
JAS. D. WALSH, Clerk.

262 (*From the Record, folio 3062 of printed book.*)

SUPREME COURT.

AARON R. STEVENS and others,
Respondents,

against

THE CENTRAL NATIONAL BANK OF BOSTON, and other certificate
263 holders, Appellants, impleaded with others.

MEM. BY HERRICK, *J.*: This case has been once before this court (57 Hun, 499) upon substantially the same facts. Upon the new trial, the Court, in its decision, followed the judgment and opinion of the General Term, and I can see no reason for differing from that decision. The judgment appealed from should be affirmed, with costs.

MAYHAM, *P.J.*, concurred; PUTNAM, *J.*, not
264 acting.

From the Record, folio 3054 of printed book.) 265

SUPREME COURT.

AARON R. STEVENS and others,
Plaintiffs-Respondents,

against

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON and others,
Defendants-Appellants. 266

GENTLEMEN:

Take notice that the defendants-appellants, the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Peter Butler, as Receiver of the Pacific National Bank of Boston, and the other certificate holders named as defendants in the above-entitled action, hereby appeal to the Court of Appeals of the State of New York from the judgment of the General Term of the Supreme Court herein, entered in the Clerk's office of the County of Rensselaer on the 25th day of May, 1893, affirming a judgment of this Court 267
entered in said Clerk's office on the 11th day of November, 1891, and for $155.20 costs, and from each and every part thereof.

Dated July 26, 1893.

Yours, etc.,
HALE & BULKELEY,
Attorneys for Appellants.

Office and Post Office Address,
25 North Pearl Street,
Albany, N. Y.

To the Clerk of the County of Rensselaer, and to
CAMPBELL & PAIGE, Esqs.,
Attorneys for Respondents.

268 (*From 49 Federal Reporter.*)

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF NEW YORK.

THE CENTRAL NATIONAL BANK OF BOSTON

vs.

269 ROWLAND N. HAZARD and others.

WALLACE, Circuit Judge:

The petitioner asks the Court to set in motion one of its officers *pro hac vice*, who, by a decree made on the 24th day of March, 1887 (30 Fed. Rep. 484), was directed to sell at public auction, after giving due notice of the time and place of sale, according to law and the practice of this Court, certain real and personal property, consisting of the railroad, rolling stock, &c., which formerly
270 belonged to the Lebanon Springs Railroad Company. The petitioner invokes the action of the Court because a decree has been made by the Supreme Court of the State of New York in a suit brought subsequent to the rendition of the decree of this Court, which, among other things, perpetually enjoins and restrains the parties in this suit from proceeding with the sale of the property under the decree of this Court. The petitioner was not a formal party to the suit in the State Court, and, as the suit in this Court was prosecuted in his behalf, as one of those similarly situated with the complainant, he has a status which enables him to

intervene, as is supposed, without violating the injunction of the State Court. If there were any reason to impute contumacy to the officer who has halted in the performance of the duty imposed upon him by the Court, the appropriate application would be one for his removal; but it is apparent that his conduct is influenced by a desire to respect the injunction of a State Court, which in spirit, though not in terms, prohibits him from proceeding with the sale until the instructions of this Court have been obtained. 271

The case is this: Prior to the year 1880, the Lebanon Springs Railroad Company had mortgaged its property to secure bonds to the amount of $2,000,000, to the Union Trust Company, as trustee, and that mortgage had been foreclosed and the property sold, and, by mesne conveyances from the purchaser, the title to the property had been acquired by the New York, Boston and Montreal Railway Company. In the year 1880 an action was brought in the Supreme Court of the State of New York by one Sackett, who owned some of the mortgage bonds, in his own behalf, and that of all other owners of the bonds, the object of which was, in substance, to obtain an adjudication that the equitable title to the property was still in the bondholders, and a decree for a sale of the road for the benefit of the bondholders. During the pendency of the action the Court appointed a receiver, and authorized the receiver to issue certificates to the amount of $350,000, to constitute a first lien upon the property. That action resulted in a decree entered in January, 1885, adjudging that the title to the railroad property was in the original bondholders, and ordering the road to be sold for their benefit, subject to the principal and accrued interest upon the receiver's certificates. A sale was made pursuant to that decree, and upon the sale 272 273

274 Hazard & Foster became the purchasers. By the terms of the purchase Hazard and Foster assumed and agreed to pay the receiver's certificates, but after acquiring a deed they made default. The complainant in the present suit was the owner of $250,000 of the certificates, and in April, 1886, brought this suit, in behalf of itself and all the other certificate holders, to obtain a decree declaring the certificates to be a lien upon the property, and to enforce payment by the sale of the property and a personal judgment against Hazard & Foster for any deficiency. Hazard & Foster contested the suit, but it resulted in a decree adjudging the cer-
275 tificates to be a lien, ordering the sale of the property, and requiring Hazard & Foster to pay to the complainant, and the other holders of the certificates, any deficiency remaining unsatisfied after the sale of the property. The decree also reserved leave to the complainant and to the other certificate holders to apply to the Court at any time for the appointment of a receiver to take possession of the property, and keep it until the sale.

The property was duly advertised for sale pursuant to this decree, but the sale was adjourned from time to time, until late in the year 1890, when the suit
276 was brought by Stevens and others in the Supreme Court of the State of New York, in which the injunction was granted which has given rise to this application. Stevens was the owner of some of the bonds. The object of his suit was, in substance, to impeach the decree in the Sackett suit for fraud, and to obtain a strict foreclosure of the mortgage made by the Lebanon Springs Railroad Company. The theory of the action was that the Sackett suit had been prosecuted for the benefit of a portion of the bondholders, and in fraud of the interests of others. That suit resulted in a decree, by which it was adjudged that the Sackett suit was fraudu-

lently conducted as against certain of the bondhold- 277
ers whom he purported to represent, and solely in the interest of bondholders representing only about 1,200,000 of bonds. The decree vacated the judgment in the Sackett suit, ordered a sale of the property, declared that the owners of the receiver's certificates were entitled to only the distributive share of the proceeds of the sale as might be applicable to the bonds which were actually represented in the Sackett suit, and ordered the perpetual injunction which has been referred to.

No Federal Court has ever recognized the authority of a State Court to enjoin its proceedings, or 278
to enjoin parties from proceeding, in a suit in which the Federal Court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the Federal Courts. McKim *vs.* Voorhies, 7 Cranch, 279; Riggs *vs.* Johnson Co., 6 Wall, 166; Mayor *vs.* Lord, 9 Wall, 409; Supervisors *vs.* Durant, Id., 415; Amy *vs.* Supervisors, 11 Wall, 136. "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction 279
than the utility which comes from concord; but between State Courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much with-

280 drawn, from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the Court from which it issues" (Covell *vs.* Heyman, 111 U. S., 183, 4 Sup. Ct. Rep., 355). These principles were recognized and enforced by one of the Federal Courts in a case which is very much in point. In *Fox* vs. *Railroad Co.*, 2 Abb. (U. S.), 151, a court of the State of Pennsylvania had proceeded to a decree in
281 a suit to foreclose a mortgage executed by the railroad company, and after the decree, and pending a sale ordered by the decree, executions were issued upon judgments rendered by the United States Circuit Court, and levies were made upon the mortgaged property. The Federal Court set aside the levy, holding that the court of Pennsylvania having by its decrees and authorized officers taken judicial control of the property, and ordered its sale, the property could not be taken in execution by process from any other jurisdiction.

In the present case, after the decree was made by this Court ordering the property to be sold by
282 its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this Court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in the Sackett suit, and the property had been conveyed to Hazard and Foster, the property passed from the dominion which the State Court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett

suit. As was said in Barrow *vs.* Hunton, 99 U. S. 283
80:

"If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; * * * a new case arising upon new facts, although having relation to the validity of an actual judgment or decree."

The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently 284
commenced in a State Court (*Railroad Co.* vs. *Gomila, 132 U. S., 478, 10 Sup. Ct. Rep. 155.*

It is not necessary to consider whether a State Court, in the exercise of equity jurisdiction, may not annul the judgment of a Federal Court for fraud, and, as an incident to relief, enjoin the enforcement of the judgment to the extent necessary to do justice (*Johnson* vs. *Waters, 111 U. S., 640, 4 Sup. Ct. Rep., 619*). In the present case the State Court has not assumed to disturb the decree of this Court. It has adjudged that the lien of the certificate holders has no priority over that of the 285
bondholders, but is one to be satisfied *pari passu* with theirs; and by its decree it subordinates the title which will be acquired under the sale by this Court to the title which will be acquired by a sale under its own decree. The decree of this Court finally determines the rights of the parties of the suit as between themselves. Manifestly the decrees of the State Court does not disturb the right of the certificate holders to enforce the payment of their certificates against Hazard and Foster by a sale of their property and a personal judgment for the deficiency. A personal judgment cannot be

286 obtained under the present decree without a sale of the property, in order to ascertain the deficiency and fix the amount recoverable. Such a sale cannot injuriously affect the property interests which are recognized and protected by the decree of the State Court. A sale under its decree will extinguish all subordinate titles, good as well as bad.

It would be rank injustice to the complainant and the other certificate holders to postpone the enforcement of their demands against Hazard and Foster to await the result of the litigation in the State Court, which seems likely to be a protracted
287 one. The order applied for is therefore granted.

288

(*From the Record—Printed Pamphlet.*) 289

IN THE COURT OF APPEALS OF NEW YORK.

AARON R. STEVENS, IDA S. HARRISON and others,
Respondents,

against

THE UNION TRUST COMPANY and others, and THE CENTRAL NATIONAL BANK OF BOSTON and others, 290
Appellants.

Stipulated that the motion noticed as within, be heard with the appeal in the same case.

HALE, BULKELEY & TENNANT, Attorneys for Appellants.

CAMPBELL & PAIGE, Attorneys for the Plaintiffs.

EDWARD WINSLOW PAIGE, Attorney for Lebanon Springs Railroad, for this motion. 291

292 COURT OF APPEALS.

AARON R. STEVENS and others

against

THE UNION TRUST COMPANY OF NEW YORK and others.

SIRS: You will take notice that on behalf of the plaintiffs in the above action, and the Lebanon
293 Springs Railroad, we will move the Court of Appeals at the Capitol, in the City of Albany, on the fourteenth of June, 1894, that the appeals in the above action be dismissed and the judgment therein be affirmed, and for such other and further relief as to the Court shall seem just. That such motion will be made upon the deed of William Foster, Jr., and wife, to the Lebanon Springs Railroad, the resolution of the directors of that company and the stipulation and consent of that company, copies of which are hereto annexed, and also upon the deed of Worthington Frothingham, referee, to William
294 Foster, Jr., and the appeal book in the action, copies of both of which are in your possession.

CAMPBELL & PAIGE,
Attorneys for Plaintiffs,
44 Cedar Street, N. Y.

EDWARD WINSLOW PAIGE,
Attorney for L. S. R.R., for this motion.

To MESSRS. HALE, BULKELEY & TENNANT, Attorneys for Central National Bank and others.

It being suggested that the appeal in Stevens against Union Trust Company and others, of the

Central National Bank of Boston and others, holders of certificates issued by Van Valkenburgh, when receiver, will shortly be reached in the Court of Appeals; and it is also being suggested that this company owns all the interest of those appellants by virtue of the deed of Worthington Frothingham, Esq., Master *pro hac vice* appointed by the Circuit Court of the United States, to William Foster, Jr., and the deed of William Foster, Jr., and wife, to this company. 295

Resolved, That the judgment in this action be affirmed; that the pending appeals be withdrawn; that the president execute in the name of the company, a stipulation and consent to the plaintiffs for the affirmance of the judgments and the withdrawal of the appeals, and to that end that the president employ and direct counsel for and in the name of the company to consent to and assist in any motion which may be made by the plaintiffs for the dismissal of the appeal and the affirmance of the judgment. 296

I CERTIFY that the above is a copy of resolution of the board of directors of the Lebanon Springs Railroad, and that the same was unanimously passed at a Special Meeting called pursuant to the by-laws, and held in the City of New York on the twenty-fourth of April, 1894. 297

WILLIAM V. REYNOLDS,
President.

THE LEBANON SPRINGS RAILROAD does hereby consent and stipulate that the judgment in the action of Aaron R. Stevens and others, against the Union Trust Company and others, from which appeals are now pending in the Court of Appeals,

298 be affirmed; and that the appeals pending therein be withdrawn.

New York, April 24th, 1894.

THE LEBANON SPRINGS RAILROAD,
By WILLIAM V. REYNOLDS,
President.

THIS INDENTURE, made this ninth day of June, one thousand eight hundred and ninety-three, between William Foster, Jr., and Caroline M. Foster, his wife, both of the City of New York, of the first part, and the Lebanon Springs Railroad, of the
299 second part, witnesses as follows:

That the said parties of the first part in consideration of a plan of agreement for the readjustment of the interests of the creditors and stockholders of the Lebanon Springs Railroad Company and its successors, made the fourteenth day of May, 1892, and also in consideration of one dollar to them paid by the Lebanon Springs Railroad, the receipt of which is hereby acknowledged, have bargained, sold, and by these presents do grant and convey unto the said party of the second part and its successors and assigns forever, all the premises, prop-
300 erty, franchises and powers described as follows, to wit:

All the franchises and powers conferred upon the Lebanon Springs Railroad Company by the following acts of the Legislature of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An Act to authorize the Lebanon Springs Rail-"road Company to construct an extension of its "road into Massachusetts and Vermont, and to "provide means therefor," passed March 8th, 1853, and being Chapter 25 of the laws of that year.

"An Act to amend an act entitled 'An Act to

" ' authorize the Lebanon Springs Railroad Com- 301
" ' pany to construct an extension of its road into
" ' Massachusetts and Vermont and to provide
" ' means therefor,' passed March 8th, 1853,"
passed June 24th, 1853, and being Chapter 461 of
the laws of that year.

" An Act to enable certain connecting railroad
" companies to aid in the construction of the Leb-
" anon Springs Railroad," passed April 12th,
1855, and being Chapter 350 of the laws of that
year.

" An Act to extend the time for the completion
" of the Lebanon Springs Railroad," passed March
23d, 1857, being Chapter 150 of the laws of that 302
year.

" An Act to extend the time for the completion
" of the Lebanon Springs Railroad," passed April
12th, 1860, and being Chapter 285 of the laws of
that year,

" An Act to extend the time for the completion
" of the Lebanon Springs Railload," passed April
22d, 1862, and being Chapter 444 of the laws of
that year.

" An Act to amend the charter of the Lebanon
" Springs Railroad Company," passed April 9th,
1864, and being Chapter 145 of the laws of that 303
year.

" An Act to authorize any town in the counties
" of Columbia or Rensselaer to aid in the comple-
" tion of the Lebanon Springs Railroad," passed
April 4th, 1866, and being Chapter 373 of the laws
of that year.

" An Act to extend the time for the completion
" of the Lebanon Springs Railroad," passed 26th
February, 1867, and being Chapter 46 of the laws
of that year.

And all the powers and franchises of railroad
corporations stated in "An Act to authorize the

304 "formation of railroad companies, and to regulate "the same," passed by the Legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto and the powers to purchase, construct and operate the railroad hereinafter described, extending from Chatham Four Corners, in the County of Columbia, northerly through the counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also the certain other special and particular powers and franchises stated in the above acts, and also the
305 following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the management of the business thereof, which might be done if that part were within the State of New York.

To create preferred stock at such rate of dividend, or interest, and with such securities therefor as may be deemed expedient.

To extend the road by construction or purchase, into the States of Vermont or Massachusetts, as far as is or may be permitted by the authority of said
306 states.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company —was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and

To consolidate either alone or after consolidation with any company into a single corporation, with any company having a railroad, which, or a portion of which should be within the State of New York, and which should connect with the railroad of the

Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in "An Act to authorize the consolida- "tion of certain railroad companies," passed by the Legislature of New York, April 2d, 1853. 307

To exercise all the powers with respect to the railroads or portions of railroads which might be constructed or acquired within the States of Vermont and Massachusetts as may be exercised if the same were wholly within the State of New York.

To have corporate stock and bonds taken and owned or guaranteed by any company having or being authorized to construct a railroad connecting with the lines of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad. 308

To change the northern terminus of the railroad from the Massachusetts State Line as declared in the articles of association of the Lebanon Springs Railroad Company to any point within the town of Hoosick, in the County of Rensselaer, or the town of White Creek, in the County of Washington. 309

To construct a branch to a terminus at the Vermont State line, at a point of junction with the Western Vermont Railroad, now known as the Bennington and Rutland Railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same effects as if the line had been originally fixed in the articles of association both as to the main line and branches as the same are last above described, and the terminal thereof had been its original terminus.

Also all powers and franchises conferred by the

following acts, which were duly passed by the Legislature of the State of Vermont, to wit:

"An Act to incorporate the Vermont and New "York Railroad Company," approved November 2d, 1865, and being No. 134 of the laws of that year.

"An Act to amend an act entitled 'An Act to "incorporate the Vermont and New York Rail- "road Company,'" approved November 2d, 1865, approved November 19th, 1866, and being No. 167 of the laws of that year.

"An Act authorizing the Bennington and Rut- "land Railroad Company to consolidate their road "with the road of the Lebanon Springs Railroad "Company," approved November 21st, 1867, and being No. 155 of the laws of that year.

"An Act to enable the Bennington and Rutland "Railroad Company to aid in obtaining necessary "railroad connections," approved March 28th, 1867, and being No. 2 of the Special Sessions of that year.

And the powers and franchises of railroad corporations under the laws of Vermont, and the powers and franchises to build, own and operate a railroad from Bennington to the Vermont State Line, being that portion of the railroad hereinafter described, which is in the State of Vermont, and to transfer and convey such powers and franchises and any property, and to consolidate with railroad companies.

And also the following described property, to wit:

All and singular the tracks or roadway of the Lebanon Springs Railroad, from Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in the town of Hoosick, in the County of Rensselaer, and all the lands acquired and hereafter to be acquired for the

purpose of forming said track or roadway; also the 313
railroad of the said Lebanon Springs Railroad Company already built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same, and of all of the above-mentioned powers and franchises; and also all the rolling stock, locomotives, tenders, snow-plows, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description. All the machine-shops and blacksmith- 314
shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York Railroad constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above-mentioned powers and franchises of the said Vermont and New York Railroad Company, belonging to or in any-wise appertaining to, or which may at any time belong to or appertain to, or have belonged to or appertained to the same or either of said railroads or companies, as well in 315
law as in equity; including also all property of every kind, name or nature of, or purchased by or now or heretofore in the possession of the Lebanon Springs Railroad Company, either of the corporations called the Harlem Extension Railroad Company, the Vermont and New York Railroad Company, John W. Van Valkenburgh, as receiver, the New York, Rutland and Montreal Railway Company, and William V. Reynolds, as receiver; and including also all property, powers and franchises of every name and nature described or mentioned in or subject to the

316 lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867, or of the mortgage executed by the Harlem Extension Railroad Company, and bearing date first of April, 1870; and also all property of every name and nature described in or subject to the lien of the mortgage executed by the New York, Rutland and Montreal Railway Company to the American Loan and Trust Company.

And also all the property described in a certain mortgage made by Jas. C. Hull and wife and Chas. G. Lincoln, to Wm. Butler Duncan and Trenor W.
317 Park, which said mortgage bears date the twenty-eighth of January, 1873, was made to secure the payment of five millions of dollars and interest and was recorded in Rensselaer County Clerk's Office, February 14th, 1873, in Book No. 137 of Mortgage, page 344; and also recorded in Bennington County Clerk's Office, Vermont, May 1st, 1873, at 4 hours, 30 minutes P.M.

And also all the premises, property, franchises and powers conveyed to the said William Foster, Jr., party of the first part, by either of the following deeds, that is to say:

318 1. A deed made to the said William Foster, Jr., by John L. Henning, Referee, appointed by judgment of the Supreme Court of New York, entered in Rensselaer County eleventh of November, 1891, and amended 5th of April, 1892, in an action in which Aaron R. Stevens and others were plaintiffs, and the Union Trust Company of New York and others were defendants. Said deed bears date the sixteenth day of May, 1892, and was acknowledged on the twenty-eighth of May, 1892.

2. A deed made to the said William Foster, Jr., by the New York, Boston and Montreal Railway Company, bearing date the seventeenth day of

May, 1892, and acknowledged the twenty-seventh day of May, 1892. 319

3. A deed made to the said William Foster, Jr., by William Butler Duncan, and by John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, bearing date the seventeenth day of May, 1892, and acknowledged the fifth of January, 1893, and the sixth of April, 1893.

4. A deed made to the said William Foster, Jr., by Worthington Frothingham, as Referee, appointed by a decree of the Circuit Court of the United 320
States for the Northern District of New York, passed twenty-fourth March, 1887, in an action in equity in which the Central National Bank of Boston was complainant and Rowland N. Hazard and others were defendants. Said deed bears date the twenty-fifth day of April, 1892, and was acknowledged on the twenty-seventh day of April, 1892.

To have and to hold all and singular the premises, property, franchises and powers above mentioned and described, unto the said party of the second part, its successors and assigns, forever.

In witness whereof, the parties of the first 321
part have hereunto set their hands and seals, the day and year first above written.

WM. FOSTER, JR.
CAROLINE M. FOSTER.

Signed, sealed and delivered in presence of }

GEORGE W. OAKLEY.

322 STATE OF NEW YORK, }
City and County of New York, } ss.:

On this ninth day of June, 1893, before me personally came William Foster, Jr., and Caroline M. Foster, his wife, known to me and to me known to be the persons described in and who severally acknowledged to me that they executed the within instrument.

GEORGE W. OAKLEY,
Commissioner of Deeds,
City and County of New York.

323

DEED.

This indenture, made this twenty-fifth day of April, in the year of our Lord, one thousand eight hundred and ninety-two, between Worthington Frothingham, of Albany, N. Y., Referee in the action hereinafter mentioned, of the first part, and William Foster, Jr., of the City, County and State of New York, of the second part;

Whereas, at a Special Term of the Circuit Court of the United States, held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the City of Syracuse on
324 the 24th day of March, 1887, it was among other things, ordered, adjudged and decreed by the said Court in a certain action then pending in the said Court, between the Central National Bank of Boston, which sues as well for itself as for all others similarily situated, plaintiff, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York, defendants, that all and singular, the premises, franchises and property mentioned in the complaint in said action, and hereinafter described, and in said decree described, or so much thereof as might

be sufficient to satisfy the amount due and unpaid 325
on the Receiver's certificates mentioned in the complaint in said action, and expenses of sale, and the costs of this suit, and which might be sold separately without material injury to the parties interested, be sold at public auction in the County of Rensselaer in said Northern District of New York, according to the course and practice of said Court, by or under the direction of the said Worthington Frothingham, who was appointed a referee in said action, and to whom it was referred by the said decree of the said Court, among other things, to make such sale; that the said sale be made in the county where the said premises, franchises and 326
property, or the greater part thereof, are situated; that the said referee give public notice of the time and place of such sale, according to law and the rules and practice of said Court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said Referee execute to the purchaser or purchasers of the said premises, franchises and property, or such part or parts thereof, as shall be sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas the said Referee in pursuance of the said decree of the said Court, did on the 23d 327
day of March, one thousand eight hundred and ninety-two, sell at public auction at two o'clock in the afternoon of that day at the outer westerly door of the Court House in the City of Troy, County of Rensselaer and State of New York, the premises, franchises and property in said decree mentioned, due notice of the time and place of such sale being first given, agreeably to the said decree; at which sale the premises, franchises and property hereinafter described were struck off to the said party of the second part, for the sum of seven thousand

five hundred dollars, that being the highest sum bid for the same.

Now this indenture witnesseth, that the said Referee, the party of the first part to these presents, in order to carrry into effect the sale so made by him as aforesaid, in pursuance of the decree of the said Court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents, doth grant and convey unto the said party of the second part, the premises, franchises and property directed by said decree to be sold, and described therein as follows: The premises and property described as contained in a certain mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by a deed executed by George McClellan, Referee, to William Foster, Jr., and Rowland N. Hazard as follows: "All the right, title and interest of the said party of the first part (said Lebanon Springs Railroad Company) of, in and to all and singular the track or roadway of the party of the first part, from the Chatham Four Corners in the County of Columbia to the east line of the State of New York, in the town of Hoosick, in the County of Rensselaer, and all lands thereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said party of the first part, now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues, and profits and alienable franchise of the said party of the first part, connected with said railroad, or relating there-

to, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow ploughs and scrapers and all the passenger cars, baggage, mail and expresss cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars, now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be sold therewith, and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York Railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York Railroad, belonging or in any wise appertaining, or which may at any time belong or appertain to the same as well in law as in equity."

331 332 333

TO HAVE AND TO HOLD all and singular the premises, franchises and property above mentioned and described and hereby conveyed unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part, Referee as aforesaid, hath hereunto set his hand and seal the day and year first above written.

WORTHINGTON FROTHINGHAM, [SEAL.]
Referee.

In presence of
WM. S. BEERS.

334 STATE OF NEW YORK, City and County of Albany, } ss.:

On this 27th day of April, in the year one thousand eight hundred and ninety-two, before me, the subscriber, personally came Worthington Frothingham, Referee, to me known to be the person described in and who executed the within instrument, and duly acknowledged that he executed the same.

WM. S. BEERS,
Notary Public,
Albany Co., N.Y.

[SEAL.]

335 STATE OF NEW YORK, City and County of Albany, Clerk's Office, } ss.:

I, ANSEL C. REQUA, Clerk of the said City and County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that Wm. S. Beers, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument in writing, and endorsed thereon, was at the time of taking such proof or acknowledgment, a Notary Public, in and for the County aforesaid, dwelling in the said County, and duly authorized to take the same; and
336 that I am well acquainted with the handwriting of the said Notary and verily believe that the signature to the said certificate or proof of acknowledgment is genuine; and that the said instrument is executed and acknowledged according to the laws of the State of New York.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as County Clerk of said Courts, this 27th day of April, 1892.

[SEAL.]

A. C. REQUA,
Clerk.

UNITED STATES OF AMERICA,
Circuit Court Clerk's Office,
Northern District of New York. } 337

I, WILLIAM S. DOOLITTLE, Clerk of said Court, do hereby certify that I have compared the annexed copy of order confirming report of sale, The Cent. Natl. Bk. of Boston, which sues, &c., *vs.* R. N. Hazard and others, in Equity No. 5575, and the endorsements thereupon, with the original now on file in this office, that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have caused the seal 338
of the said Court to be affixed at the City
[SEAL.] of Utica, in said District, this 30th day
of October, A.D. 1895.

W. S. DOOLITTLE,
Clerk.

339

340 At a term of the Circuit Court of the United States in Equity sitting, held in and for the Northern District of New York, at the Court House in the Village of Canandaigua, on the 22d day of June, 1892.

Present—Hon. WILLIAM J. WALLACE,
Judge.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for
341 itself as for all others similarly situated,

against

ROWLAND N. HAZARD, WILLIAM FOSTER, JR., and others.

On reading and filing the report of Worthington Frothingham, the Referee duly appointed herein to sell the premises and property mentioned and described in the decree and in the bill of complaint
342 herein, and on proof of due service of the affidavit of Alpheus T. Bulkeley, and the order to show cause herein, dated June 18th, 1892, on the attorneys for the respective parties herein, and on Marchus T. Hun, attorney for E. H. Bonner & Co., on motion of Hale & Bulkeley, solicitors for the complainant, no one appearing in opposition thereto,

It is ordered that the said report of sale of the said Referee be and the same hereby is in all things confirmed.

WM. J. WALLACE.

(*From the Record—Typewritten following printed pamphlet.*) 343

COURT OF APPEALS.

AARON R. STEVENS and others,
Respondents,

against

THE CENTRAL NATIONAL BANK OF BOSTON and other defendants, holders of Receiver's certificates, impleaded, &c.,
Appellants. 344

City and County of New York, ss.:

ALPHEUS T. BULKELEY, being duly sworn, says: That he is one of the attorneys for the appellants in the above-entitled action. Deponent further says that after the rendition of the judgment in the above-entitled action, William Foster, Jr., one of the defendants in said action, brought another 345 action in the N. Y. Supreme Court against the said Central National Bank of Boston and other defendants, including the certificate holders who are defendants in this action, in which the prayer of the complaint was, among other things, that as to so much of the decree of the Circuit Court of the United States, dated March 24, 1887, as orders, adjudges or decrees that plaintiff, said William Foster, Jr., either alone, or with Rowland N. Hazard, pay to the said Central National Bank of Boston, and to the other of said certificate holders, or either or any of them, the residue of the in-

346 debtedness on said certificates, remaining unsatisfied after the sale of said property, and the application of the proceeds thereof, the plaintiff is entitled to have the same annulled, and the enforcement thereof perpetually enjoined; and that as to so much of the decree of the said United States Circuit Court as adjudges that the said Central National Bank of Boston and other certificate holders have execution for the residue or any part of said indebtedness, the plaintiff is entitled to have the same annulled and the enforcement thereof perpetually enjoined; and that it be adjudged
347 that the defendants, and each of them, their attorneys, counsel, &c., be perpetually restrained and enjoined from issuing any execution against the plaintiff or his property, or any part thereof, under the said decree of the Circuit Court of the United States, or taking proceedings in the said Court or otherwise, for the purpose of enforcing the payment or collection of the said certificates, or any of them, or any part of the same; and that defendants be enjoined from permitting or suffering any such execution to be issued or any such proceedings to be taken in the name of them or any of them, or on their behalf; and that it be adjudged
348 that the said Central National Bank and the said certificate holders, and each of them, execute on the demand of the plaintiff and deliver to him, duly proved or acknowledged so as to admit to record, a proper release or satisfaction of the said decree in so far as it requires the plaintiff, the said William Foster, Jr., to make any payment to the Central National Bank and to the other of said certificate holders, or directs that the said bank and the other certificate holders have execution against the plaintiff or his property, or any part thereof.

The complaint of the said William Foster, Jr.,

plaintiff in said action, sets forth among other 349
things, the judgment in this action, from which an appeal to the New York Court of Appeals is now pending, a copy of which is annexed to his complaint, as Exhibit B, and made a part of said complaint; and the complaint bases his claim for the relief asked for in said complaint, upon the said judgment in this action. In said action, in which said Foster was plaintiff, Mr. Justice Putnam granted a temporary injunction enjoining and restraining the said Central National Bank of Boston and the other certificate holders defendants in said action, from issuing execution upon the said decree 350
of the Circuit Court of the United States for the purpose of enforcing the payment or collection of any of said certificates of indebtedness. The said Central National Bank of Boston, one of the defendants in said action, afterwards filed its petition under the laws of the United States, and the said action was removed into the Circuit Court of the United States for the Northern District of New York, and since said removal, the said Circuit Court of the United States has vacated the injunction therein granted by Mr. Justice Putnam and the said action is now pending and undetermined in the said Circuit Court of the United States. 351

Deponent further says that the said Central National Bank of Boston in its answer in said action wherein the said William Foster, Jr., is plaintiff, now pending in the Circuit Court of the United States, sets up and claims that the Supreme Court of the State of New York did not have and has not jurisdiction and power to deprive said defendant and the other certificate holders represented by it in that suit of the benefit of said decree rendered by the Circuit Court of the United States or any part thereof or any remedies to which it and the other certificate hold-

352 ers are entitled under the rules and practice of said Circuit Court of the United States, and hereby refers to the answer in said action.

Deponent further says, upon information and belief, that it is contended and claimed by the counsel for the said Foster in said action that the sale of the premises described in the complaint under the said decree in the United States Circuit Court, is void for the reason that the same was made in disobedience to the said injunction con tained in the judgment in this action, and that one of the grounds upon which said William Foster,
353 Jr., is in said action, seeking to perpetually enjoin the said Central National Bank of Boston and the other certificate holders, defendants in said action, from issuing execution against him, is that the said sale of said premises was void for the reason above stated, and that, therefore, the said Central National Bank of Boston had no right to issue execution against the said Foster, said right under said decree being dependent upon a legal and valid sale having taken place, of the premises described in the bill of complaint in the said suit wherein the said Central National Bank of Boston was complainant and the said William Foster, Jr., and
354 others were defendants.

Deponent further says, upon information and belief, that it is important for the interests of the said The Central National Bank of Boston and the other certificate holders, appellants in this action, in view of the suit now pending in the Circuit Court of the United States wherein said William Foster, Jr., is plaintiff, to carry on and prosecute the appeal from the judgment in this action.

Deponent further says that proceedings have been instituted in the Supreme Court of this State against one of the appellants herein, upon an application to punish him for contempt in not obey-

ing the provisions of the said judgment in this 355
action, enjoining the defendants certificate holders from procuring or suffering a sale of said premises to take place, which application has never been decided so far as deponent has learned, but is still pending before the Special Term of said Supreme Court.

Deponent further says that William V. Reynolds, whose name is attached to the so-called consent and stipulation appended to the notice of motion to dismiss the appeal herein, was, at the time of the commencement of this action, on the motion of Mr. Paige, counsel, and one of the at- 356
torneys for plaintiffs, appointed receiver of the Lebanon Springs Railroad Company in this action, and has ever since, as deponent is informed and believes, been in possession of the railroad premises described in the complaint, either as such receiver or as the agent of William Foster, Jr.; and has been during all said period in the interest of the plaintiffs, or of the attorneys and counsel for plaintiffs, and acting in conformity with their wishes; and deponent says, upon information and belief, that the resolution and consent referred to in the notice of motion, have been adopted and executed by the direction and in the interest of the plain- 357
tiffs, or the attorneys for plaintiffs, and also in the interest and for the benefit of the defendant William Foster, Jr.

ALPHEUS T. BULKELEY.

Sworn to before me this 20th day of October, 1894.

WM. S. BEERS,
Notary Public,
Albany Co., N. Y.

358 (*From the Record, follows Bulkeley's affidavit.*)

In November Term of the Court of Appeals of the State of New York.

On the 27th day of November, 1894, judgment was duly given and rendered in and by said Court of Appeals, whereby the said judgment of the said Supreme Court was in all things affirmed, with costs.

The following is the opinion delivered in the Court of Appeals of the State of New York:

359 AARON R. STEVENS *et al.*,
Respondents,

vs.

THE CENTRAL NATIONAL BANK OF BOSTON *et al.*, impleaded, etc.,
Appellants.

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, entered upon an order made May 9th, 1893, which affirmed a judgment in favor of plaintiffs
360 entered upon a decision of the Court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

MATTHEW HALE, for appellants.
EDWARD WINSLOW PAIGE, for respondents.

BARTLETT, *J.:*

This appeal involves a contest between the bondholders and holders of receiver's certificates of the Lebanon Springs Railroad Company and its successor, the Harlem Extension Railroad Company.

A recital of the main facts in this litigation is 361
essential, as it will present clearly the questions of law submitted for our determination.

The Lebanon Springs Railroad Company, in 1869, was operating its completed road from Chatham, New York, to Bennington, Vermont; prior to that time, in July, 1867, it issued and sold its bonds to the amount of two millions of dollars and secured the same by mortgage to the Union Trust Company of New York, in trust, covering its property, rights and franchises.

Early in the year 1870, the Lebanon Springs Railroad Company consolidated with the Benning- 362
ton and Rutland Railroad Company of Vermont, and the new corporation took the name of the Harlem Extension Railroad Company.

This latter company in April, 1870, made its mortgage to the Union Trust Company of New York, in trust, to secure the payment of four millions of dollars of its bonds, but only one million four hundred thousand dollars of this issue were negotiated.

In Febrnary, 1872, the Union Trust Company began the foreclosure of the first-named mortgage in the Supreme Court of New York, and later in the same year it filed bills in the Court of Chancery 363
in Vermont, to foreclose both mortgages in that jurisdiction.

In December, 1872, and while the suits mentioned were pending, the Harlem Extension Railroad Company consolidated with corporations not material to mention in this connection, and assumed the name of the New York, Boston and Montreal Railway Company.

In January, 1873, the property covered by the two million mortgage in this State, was sold and conveyed, in the Union Trust Company foreclosure suit, to James C. Hull, a clerk in the office of the

364 defendant William Butler Duncan, for the nominal sum of one hundred thousand dollars, and about the same time there were sales under the Vermont decrees and conveyances, executed to Charles G. Lincoln, a clerk for one Trenor W. Park, for the nominal sum of fifty thousand dollars.

It is found in this action, that the Union Trust Company never did anything to enforce the payment of these bids, and that they were never paid.

On the 28th of January, 1873, Hull and Lincoln, without any consideration, executed to the defendant William Butler Duncan and one Trenor W.
365 Park, a bond for the payment of five millions of dollars, secured by a mortgage covering the property conveyed to them under the foreclosure sales in New York and Vermont.

It is found in this action, that both Duncan and Park knew that the consideration for the deeds of Hull and Lincoln remained unpaid. On the 30th of January, 1873, Hull and Lincoln conveyed the property, without consideration and subject to the Duncan and Park mortgage, to the New York, Boston and Montreal Railway Company.

The five million dollar mortgage made to Duncan and Park, represented substantially the aggre-
366 gate indebtedness which the New York, Boston and Montreal Railway Company was to assume under the consolidation and other agreements.

The latter company paid to Duncan and Park $807,077.05, on account of the money due on said mortgage, but failed to pay the balance, became insolvent, and in April, 1875, Daniel Butterfield was appointed by the Supreme Court of the State of New York Receiver of all its property and effects.

During the year 1873 the New York, Boston and Montreal Railway Company executed to Seligman, Sherman and Brown, a mortgage to secure bonds of the aggregate amount of twelve

millions, two hundred and fifty thousand dollars, also another mortgage to the New York Loan and Indemnity Company, to secure the payment of additional bonds to the aggregate amount of twelve millions, seven hundred and fifty thousand dollars. 367

A sufficient amount of these bonds were sold in Europe to realize six millions of dollars.

In November, 1873, the New York, Boston and Montreal Railway Company, leased its road to the Central Vermont Railway Company, which lease was operated until August 20, 1877, when it was abandoned.

In the meantime the lessor company had become insolvent, as already stated, and in September, 1877, one Russell C. Root took possession of the property without legal right, and subsequently, on November 27, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company. 368

Root, in the name of this company and as its President, continued to operate the road until possession was taken from him by the court, as will presently appear.

In September, 1880, one Marvin Sackett, bondholder of the Lebanon Springs Railroad Company, brought an action in the Supreme Court of New York, against Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company, and Daniel Butterfield, as its Receiver. Sackett alleged in his complaint that he brought the action in behalf of himself and all other bondholders of the Labanon Springs Railroad Company similarly situated, who hold any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit." 369

370 The complaint further alleged the mortgage to secure plaintiff's bond to the Union Trust Company of New York, the action to foreclose, the sale thereunder, and the non-payment of the purchase money to the trustee.

In brief, the Sackett suit was ostensibly a representative action for the benefit of bondholders, and sought apparently to charge Duncan and his clerk, Hull, who took title at the foreclosure sale in this State, as trustees for the bondholders. The complaint further prayed for a receiver and sale of the property; that all titles under the foreclosure sale
371 should be declared void, and for such other relief as was just.

It will be observed that while the Sackett suit professes to seek the objects indicated, that it failed to bring before the Court the necessary parties to render such a decree as was prayed for binding, viz.: the Union Trust Company of New York, Duncan, Park, Hull, Lincoln, and the trustees under the mortgages.

The record in the Sackett suit also discloses some other remarkable features.

In October, 1880, John Van Valkenburgh was appointed receiver. Intermediate the appointment
372 of the re eiver and February 1st, 1881, holders of large amc nts of both Lebanon Springs and Harlem Extension bonds petitioned the Court in two separate proceedings, to be made parties to the action, but both applications were denied. After the denial of these motions, and in February, 1881, the receiver petitioned for instructions, and suggested that he issue certificates to be made first lien for, among other things, the "settlement of unavoidable indebtedness of the company now existing." April 2d, 1881, after the coming in of the report of an expert to examine the railroad, and no one appearing, except the receiver's counsel,

the receiver was ordered to issue certificates of indebtedness to the amount of $350,000, and a referee was appointed "to hear and determine all existing claims against the said Lebanon Springs Railroad Company." The receiver had previously borrowed twenty-five thousand dollars without authority of the Court. The disposition made of a portion of the proceeds realized by the sale of the receiver's certificates will be considered later. 373

The Sackett suit did not reach final judgment until Jauuary, 1885, after a delay of between four and five years. Later, in 1885, the referee, under the judgment, sold the property to William Foster, Jr., for $155,000. 374

The action at bar was begun in the Supreme Court of New York, April, 1887, by bondholders owning bonds of both the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company.

The complaint brings in all the parties in interest; it seeks to enforce the foreclosure judgments and decrees of 1872 in the suits instituted by the Union Trust Company of New York, both in Vermont and this State; it is also in the nature of a bill of review of the judgment in the Sackett suit and a bill for relief against the judgment and proceedings in that suit as fraudulent; it also seeks the foreclosure of all junior liens. 375

The Special Term of November 10th, 1891, rendered a judgment for the plaintiffs in this action, a sale of the property was made by the referee, and on the 16th of May, 1892, William Foster, Jr., received a deed as purchaser.

This judgment was affirmed by the General Term of the Third Department.

It now becomes necessary to consider the manner in which this appeal is presented.

In 1886, and before the case at bar was begun,

376 one of the defendants in this action, the Central National Bank of Boston, on behalf of itself and all other holders of the receiver's certificates issued under the judgment in the Sackett suit, brought an action in the Supreme Court of New York against Foster and Hazard, the purchasers under the Sackett judgment, and a corporation called the New York, Rutland and Montreal Railway Company, their grantee. The complaint in this action recited in detail the proceedings in the Sackett suit which led to the issuing of receiver's certificates, alleged that the Central National Bank of
377 Boston held two hundred and fifty thousand dollars, par value, of the same, and that the balance of certificates were owned by divers persons and corporations.

It was also alleged that Hazard and Foster, when purchasing under the Sackett judgment, had assumed and agreed to pay the amount of unpaid principal and interest on said certificates of indebtedness, after application of the purchase money.

It prayed that the certificates be declared a first lien on the property; that a receiver be appointed property sold, and Hazard and Foster adjudged to pay deficiency. This suit was removed into the
378 United States Circuit Court on petition of the defendants, on ground of citizenship of parties.

On the 24th of March, 1887, a decree was entered in favor of plaintiffs, and a sale of the property ordered.

Within thirty days after the entry of this decree the action at bar was begun, and proceeded to judgment before sale under the Federal decree, which did not take place until 1892.

The defendants appealing from the judgment in the action at bar are the certificate holders, and the only questions presented are on their behalf.

It is urged by the learned counsel for the appel-

lants that the judgment appealed from is erroneous 379
in perpetually enjoining the appellants from proceeding with the sale of the premises under the decree of the Circuit Court of the United States; also in authorizing the referee to determine who are the owners of receiver's certificates; also on the merits, and that the motion to dismiss the complaint should have been granted.

The appellants' counsel insists that this case presents a conflict of jurisdiction between the state and federal courts, and that the injunction clause of the judgment which perpetually enjoined and restrained the Central National Bank of Boston 380
and other certificate holders from proceeding with the sale under the United States Circuit Court decree was an unlawful interference with the due and orderly procedure of a suit in which the Federal Court had first acquired jurisdiction of the subject matter. We have been cited to many cases in the State and United States Courts dealing with this question of concurrent jurisdiction and declaring well-settled principles that govern the procedure under such circumstances.

We do not consider that such a question is presented in this case, but are of opinion, assuming 381
that the Sackett suit is fraudulent, that it was competent for the Supreme Court of New York in this action at bar to bring before it all the parties in interest and to review the judgment in the Sackett suit, to vacate it as fraudulent, and to deal as a court of equity with the holders of the receiver's certificates issued under the Sackett judgment. It must be admitted that the United States Circuit Court had jurisdiction of the subject matter in the suit referred to, and that its decree was proper and binding upon the parties before it.

There is nothing in the judgment at bar that

382 attacks the jurisdiction of the United States Circuit Court or questions the legality of its decree.

The suit in the United States Circuit Court was founded upon the judgment and orders in the Sackett suit and sought as against the defendants therein to enforce their provisions and to secure to the certificate holders those rights as to priority of lien and personal judgment against Hazard and Foster, to which the Sackett judgment entitled them.

It was after the decree of the United States Circuit Court was rendered that the Supreme Court
383 of New York, sitting as a court of equity, assumed jurisdiction of all the parties connected with this long and complicated contest and undertook to adjust their rights and interests.

In so doing it rendered its judgment reviewing and reversing the Sackett judgment, setting aside the sale and referee's deed to Hazard and Foster under it, and enjoining the certificate holders from proceeding with the sale under the United States Circuit Court decree.

It is thus apparent that if a court of equity, having jurisdiction of all the parties, was to give complete relief in dealing with the entire subject
384 matter, it must restrain the certificate holders from proceeding with the sale under the decree of the United States Circuit Court, as the foundations of that suit had been utterly swept away by the judgment in the action at bar. Unless this power existed in the Supreme Court of the State of New York, it was powerless to adjust the conflicting interests submitted for its consideration.

We think it is clear, both upon principle and authority, that this power did exist and that the sale under the decree of the United States Circuit Court was without force or effect as to the parties in that suit, as they proceeded in violation of the

injunction contained in the judgment at bar. The 385
setting aside of the judgment in the Sackett suit upon which the suit in the United States Circuit Court was founded for fraud was a new fact occurring since the decree in that court which gave jurisdiction in this action to enjoin proceedings thereon.

Judge Story (2 Eq. Ju., Sec. 899, 13th ed.) uses this language in regard to foreign courts, but it is equally applicable to State and Federal Courts, viz.:

"Although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial 386
limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit.

"In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction.

"They do not pretend to direct or control the foreign court, but without regard to the situation of the subject matter of the dispute, they consider the equities between the parties and decree *in* 387
personam according to those equities and enforce obedience to their decrees by process *in personam*."

This is the acknowledged rule in England and this country.

In the case of *Barry* vs. *Brune*, reported below in 8 Hun, 395, and affirmed by this Court (71 N. Y., 262), this rule was acted upon, and the Supreme Court of this State enjoined the parties before it from collecting a judgment recovered in the United States Circuit Court for the District of Maryland. (See also Mead *vs.* Merritt, 2 Paige, 404; Dehon *vs.* Foster, 4 Allen, 550; Savage *vs.* Allen, 54 N.

388 Y., 458; Harlem R.R. *vs.* Haws, 56 *id.*, 175; N. Y. & N. H. R.R Co. *vs.* Schuyler, 17 How. Pr., 464, 468; Carron Iron Co. *vs.* Maclaren, 5 H. L. C., 439, and English cases there cited.)

Passing from this point it should be remembered that the suit of the Central National Bank of Boston was begun in the Supreme Court of New York, and was removed into the United States Circuit Court on the ground of citizenship of parties.

All that can be claimed for the decree of the latter court is that it be accorded the same force and effect as a similar judgment of the Supreme
389 Court of New York (Dupasseur *vs.* Rocherau, 21 Wall., 130, 135; Crescent Live Stock Co. *vs.* Butcher's Union, 120 U. S., 141, 147). It cannot be doubted that if the Central National Bank of Boston had proceeded to judgment in the Supreme Court of New York that the judgment in the case at bar would have dealt with that judgment precisely as it did with the decree in the United States Circuit Court.

We will now consider the disposition of this case by the Court below on the merits.

An examination of the evidence satisfies us that
390 that the findings of fact are abundantly sustained.

The fifth and sixth findings of fact are to the effect that the suit of Sackett was neither brought nor conducted for the purpose of realizing the property to the owners of the Lebanon Springs bonds, but that it was brought and conducted for the purpose of realizing out of the property certain individual claims of Sackett and Tilden in preference to and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property and were behind the mortgage. It appears that these claims exceeded thirty thousand dollars, and the aggregate fees of

counsel and receiver were about sixty-one thousand dollars, all of which were paid out of the proceeds realized by the sale of receiver's certificates. 391

The failure to bring in the necessary parties in order to render binding any judgment that might be obtained in the Sackett suit is sufficient of itself to stamp the entire proceeding as colorable and fraudulent. There was in fact no real contest, and the rights of bondholders were ignored.

The absence from the records of the Union Trust Company of New York, of Park, Duncan Hull, Lincoln and the trustees under the other mortgages than those represented by the Union Trust Company renders the Sackett suit a legal absurdity. (Western R.R. Co. *vs.* Nolan, 48 N. Y., 513; Hallett *vs.* Hallett, 2 Paige, 15–22.) 392

We do not deem it necessary to discuss in detail the legal points raised attacking the jurisdiction of the Court and the form of the action.

We think this suit is maintainable under established principles of equity jurisprudence.

The rule is well settled that Courts will set aside as a nullity a judgment, decree or award obtained by fraud. (Hackley *vs.* Draper, 60 N. Y., 88; State of Michigan *vs.* Phœnix Bank, 33 *Id.*, 8; Dobson *vs.* Pearce, 12 *Id.*, 156; Wright *vs.* Miller, 8 *Id.*, 9; Whittlesey *vs.* Delaney, 73 *Id.*, 571; Tiernan *vs.* Wilson, 6 Johns Ch., 411; Campbell *vs.* Railroad Co., 1 Woods, 368.) 393

This action was promptly begun within two years after the sale in the Sackett suit, and is to be regarded as a bill for relief against the Sackett judgment and all proceedings in that suit as fraudulent. It is not necessary to consider it as strictly a bill of review nor to discuss the law bearing upon suits of that nature.

The action was properly and seasonably brought. There is the further question whether the certificate

394 holders have any just ground to complain of the judgment as entered.

By its provisions a referee was appointed to ascertain who were the owners of the Lebanon Springs bonds and which of the bonds were actually in the Sackett suit. It further provided that the referee to sell should pay the net amount realized to the Lebanon Springs bondholders, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit, he should pay so much thereof to the holders of the receiver's certificates, and the balance, if any, to the holders of such bonds.

395 The bondholders of the Lebanon Springs Railroad Co. duly represented in the Sackett suit were, of course, bound by the order and judgment authorizing the issue of ceatificates; the remaining bondholders were in no way affected by the judgment.

It is therefore apparent that the certificate holders have been as fully protected by the judgment in the case at bar as was possible. There are no exceptions that should lead to reversal.

The judgment appealed from should be affirmed, with costs.

396 All concur except GRAY, *J.*, not voting.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES. 397

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS and others,
Defendants in Error.

Of October Term in the year of our Lord, one thousand eight hundred and ninety-four. 398

Afterwards, to wit, on the first Monday of October in the same term, before the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, come the said The Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, by Matthew Hale, their attorney, and say that in the record and pro- 399
ceedings aforesaid, it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs in error, and against the said defendants in error; and also in this, to wit, that said plaintiffs in error claimed that they were entitled in the Court of Appeals of the State of New York, to a reversal of so much of the judgment of the Supreme Court of the State of New York, as adjudged that the plaintiffs in error (defendants in said action) The Central National

Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, and all owners of certificates issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants and attorneys, are perpetually enjoined and restrained from proceeding with the sale under the degree rendered by the Circuit Court of the United States in and for the Northern District of the State of New York, in the action brought by the said The Central National Bank of Boston against the defendants in said decree, Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York, a copy of which decree is attached to the answer of the Central National Bank of Boston in this action, and from suffering said sale to proceed in their or any of their names or behalf; and also, to a reversal of so much of said judgment, as perpetually enjoined and restrained all the owners of any of the certificates above described, as issued by the receiver Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys from bringing and from proceeding with any action or proceeding in any Court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them; and also, to a reversal of so

much of the said judgment of the Supreme Court 403
of the State of New York, as required the referee named therein, to ascertain, determine and report from the evidence and findings, and such other evidence as might be furnished him, who are the holders of the certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon the same, and authorized and directed the said referee to give notice by advertising, requiring the holders of said certificates to produce the same before the said referee, at his office in Saratoga Springs, or at such other place, and at such other time as he might designate, and make 404
proof as to their title thereto, and the amount due thereon; on the grounds:

1. That the Court below erred in that it did not give due validity and effect to the said decree of the Circuit Court of the United States in and for the Northern District of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated, was complainant, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and the American Loan and Trust 405
Company of New York, were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said Court also erred in perpetually enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the Circuit Court of the United States above referred to.

3. That the said Court also erred in enjoining and restraining all owners of any of the certificates de-

406 scribed in said judgment as issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their, and each of their officers, agents, servants and attorneys, from bringing and proceeding with any action or proceeding in any Court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them.

407 4. The said Court also erred in requiring the referee named in the said judgment to ascertain and report from the evidence taken upon the trial in said action, and the findings of the Court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said Court also erred in providing in the
408 said judgment that the said referee therein named, ascertain, determine and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates issued by the said receiver, Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained and determined by the said Circuit Court of the United States, in and under the decree of the said Circuit Court of the United States, above referred to.

6. The Court below also erred in that by its judgment it required the holders of the said cer-

tificates, including the plaintiffs in error, to pro- 409
duce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon, whereas, the said facts as to the title to said certificates and as to the amount due thereon, had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States above referred to.

7. The Court below also erred in refusing to find as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Val- 410
kenburgh, as receiver, and held by the defendants the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, and the other persons who have appeared before the Master *pro hac vice* and produced their certificates, are as against all the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint as adjudged by the Circuit Court of the 411
United States by its decree in the suit of the Central National Bank of Boston *vs.* Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the Master *pro hac vice* named in said decree, and as reported by said Master.

8. The Court also erred in refusing to find as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action, such sale should be subject to the rights of the defendant The Central National Bank of Boston, and the other defendants, holders of receiver's certifi-

412 cates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein.

And that the said Court of Appeals should have reversed so much of the judgment of the Supreme Court of the State of New York, as in any way impairs the rights of the plaintiff in error or any or either of them under the said decree of the said Circuit Court of the United States, or in any way enjoins, restrains or prevents the plaintiffs in error, or any or either of them, from enforcing the said decree of the said Circuit Court of the United States, or from having and enjoying the full benefit thereof; but that the said Court of Appeals in fact
413 decided the contrary, to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the Supreme Court of the State of New York.

And the said Central National Bank of Boston, and the other plaintiffs in error above named, pray that the judgment of the Court of Appeals aforesaid, and the judgment of the Supreme Court of the State of New York aforesaid, so far as it enjoins and restrains the enforcement of the said decree of the Circuit Court of the United States, or in any way impairs the rights of the plaintiffs in error, or of any or either of them, thereunder, or in any way interferes with the due execution and enforcement of the said decree of the Circuit Court
414 of the United States, or impairs the effect thereof, may be reversed, annulled and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment of the Court of Appeals, and the said judgment of the Supreme Court of the State of New York, affirmed as aforesaid by the said Court of Appeals of the State of New York.

Dated March 7th, 1895.

MATTHEW HALE,
Attorney for Plaintiffs in Error.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD FREE AND INDEPENDENT. 415

To all to whom these presents shall come or may concern, GREETING:

KNOW YE, that we having examined the records and files in the office of the Clerk of the Supreme Court in the County of Albany, do find two certain final orders there remaining, both of which were filed on the twenty-third of September, 1895, in the words and figures here next following, all of which we have caused to be exemplified and the seal of our Supreme Court to be affixed. 416

Witness, the Honorable Judson S. Landon, a presiding Justice of our Supreme Court at Schenectady.

417

418 At a Special Term of the Supreme Court, held at the Chambers of Mr. Justice Herrick, in the City of Albany, on the second day of April, 1893.

Present—Hon. D. CADY HERRICK.
Justice.

AARON R. STEVENS, IDA S. HARRISON and others,

419 *against*

THE UNION TRUST COMPANY OF NEW YORK, The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, and others.

420

An application having been made to the Court, upon the return twenty-third of March, 1893, continued to this time, of an order to show cause why the defendants, the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, should not be punished for contempt for their disobedience of that part of the judgment in this action which perpetually enjoined

and enjoins them from proceeding with the sale 421
under the decree in the action brought by the Central National Bank of Boston against Hazard and Foster, and from suffering said sale to proceed in the name or behalf of either of them, and on reading and filing the said order to show cause granted by Mr. Justice Herrick on the nineteenth of March, 1893, the affidavits of Ida S. Harrison, Edward Winslow Paige and John Kreger, verified seventeenth and eighteenth of March, 1893, and two affidavits of Matthew Hale verified twenty-second of March, 1893, and second of April, 1893, and after hearing Mr. Paige for the plaintiffs in support of the appli- 422
cation and Mr. Hale for the above-named defendants opposed, and it appearing to the Court and the Court having found that none of the above-named defendants has in any way disobeyed said injunction nor anything in said jndgment, it is

Ordered that the said application be and is denied and these proceedings dismissed.

D. CADY HERRICK,
Jus. Sup. Ct.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss.:

I, JAMES D. WALSH, Clerk of the said City and 423
County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify, that I have compared the annexed copy order with the original thereof, filed in this office on the 23d day of September, 1895, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 23d day of September, 1895.

JAS. D. WALSH,
[L. S.] Clerk.

424 At a Special Term of the Supreme Court held at the Chambers of Mr. Justice Herrick in the City of Albany, on the nineteenth day of September, 1895.

Present—Hon. D. CADY HERRICK,
Justice.

AARON R. STEVENS and IDA S. HARRISON and others

against

425

THE UNION TRUST COMPANY OF NEW YORK, PETER BUTLER, as Receiver of the Pacific National Bank of Boston, and others.

An application having been made to the Court on the return, twenty-third of March, 1892, continued to the second day of April, 1892, of an order to show cause to punish the defendant Peter Butler for contempt of the judgment in the action by his disobedience of that part of the judg-
426 ment which perpetually enjoined him from proceeding with the sale under the decree in the action brought by the Central National Bank of Boston against Hazard and Foster, and from suffering the said sale to proceed in his name or behalf, in that he has directed the referee in that action to proceed with such sale, and has applied to the Court for an order to compel the referee to proceed with such sale, and on reading and filing the said order to show cause granted by Mr. Justice Herrick on the nineteenth March, 1893, the affidavit of Ida S. Harrison, verified seventeenth March, 1893, the

affidavits of Edward Winslow Paige and John Kreger, both verified seventeenth March, 1893, the affidavit of Edward Winslow Paige, verified twenty-sixth March, 1893, the affidavit of Worthington Frothingham, verified second of April, 1893, and the opinion of Judge Wallace upon the aforesaid application of Peter Butler, and after hearing Mr. Paige for the plaintiffs in support of the application and Mr. Hale for Mr. Butler, opposed, and it appearing to the Court that the said Peter Butler has died, it is 427

Ordered, that the said application be and is hereby denied and the proceedings dismissed. 428

D. CADY HERRICK,
Jus. Sup. Ct.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss.:

I, JAMES D. WALSH, Clerk of the said City and County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify, that I have compared the annexed copy order with the original thereof, filed in this office on the 23d day of Sept., 1895, and that the same is a correct transcript therefrom and of the whole of said original. 429

In testimony whereof, I have hereunto set my hand and affixed my official seal this 23d day of Sept., 1895. [SEAL.]

JAS. D. WALSH,
Clerk.

I, JUDSON S. LANDON, a presiding Justice at a Special Term of the Supreme Court of New York for the County of Schenectady, a County adjoining to the County of Albany, do certify that James D. Walsh, whose name is subscribed above, was on the twenty-third of September, 1895, the Clerk of the Supreme Court for the County of Albany; that full faith and credit are due to his official acts; that the seal above affixed is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated Schenectady, fourth of November, 1895.

J. S. LANDON,
Justice Supreme Court.

STATE OF NEW YORK, }
County of Schenectady, } ss.:

I, JAMES B. ALEXANDER, Clerk of the Supreme Court of New York for the County of Schenectady, do certify that the Honorable Judson S. Landon, whose name is subscribed to the preceding certificate, is Presiding Justice at a Special Term of the Supreme Court in the County of Schenectady, duly elected and sworn; that the signature by said Justice to said certificate is genuine, and that the County of Schenectady is adjoining to the County of Albany.

In testimony whereof, I have set my hand and affixed the seal of the said Court the sixth day of November, 1895.

[SEAL.]

J. B. ALEXANDER,
Clerk.

Supreme Court of the United States,
October Term, 1895.

No. 1,

CENTRAL NATIONAL BANK OF BOSTON, and others,

Plaintiffs in Error,

against

AARON R. STEVENS, THE UNION TRUST COMPANY OF NEW YORK, THE LEBANON SPRINGS RAILROAD and others,

Brief for the Defendants in Error.

IN SUPPLEMENT TO THE BRIEF FILED ON THE MOTION TO DISMISS OR AFFIRM. NUMBER 808 OF OCTOBER TERM, 1895.

Supreme Court of the United States.

NUMBER 38 OF OCTOBER TERM, 1897.

CENTRAL NATIONAL BANK OF BOSTON and others, plaintiffs in error,

against

AARON R. STEVENS, THE UNION TRUST COMPANY OF NEW YORK, THE LEBANON SPRINGS RAILROAD and others.

BRIEF FOR THE DEFENDANTS IN ERROR.

IN SUPPLEMENT TO THE BRIEF FILED ON THE MOTION TO DISMISS OR AFFIRM. NUMBER 568 OF OCTOBER TERM, 1895.

Cases recently adjudged by the Court.

Since this case was argued below the following cases, adjudged by the Court, have been reported:

Moran *v.* Sturges, 154 U. S. 256.
Shields *v.* Coleman, 157 U. S. 168.
In re Chetwood, 165 U. S. 443.
In re Johnson, 167 U. S. 116.

Moran v. *Sturges* was this: On the thirty-first of a certain July a proceeding was brought in the Supreme Court of New York to dissolve and administer the assets of a New York corporation which owned a fleet of towing steamboats, and a receiver was appointed.

On the *next* day—the first of August—libels, to enforce mariners' liens, were filed in the District Court of the United States and warrants issued to the Marshal.

The Marshal took possession first and held it.

The Court held that, *because of the possession being taken first*, the District court had the right to administer the property—although the proceeding in the Supreme Court of New York was the first begun.

Of course both proceedings were *in rem.*

It is true that in that case the jurisdiction was not concurrent—but the jurisdiction of the Federal court was exclusive—the State court having no authority to displace the maritime liens or in any manner to adjudge anything about them.

BUT *it is equally true*, as we claim, *that* in this case also *the jurisdiction is not concurrent, but that the State court had and has exclusive jurisdiction of the cause of action involved in this case.*

This will later appear.

The Court, speaking by Mr. Chief Justice Fuller, said: (154 U. S. 270.) "So, in *Dietzsch* v. *Huidekoper*, 103 "U. S. 494, a plaintiff in a replevin suit brought in a State "court had properly removed it to the Federal court and "obtained a judgment there in his favor, but the State court "proceeded to try the cause and render judgment against "the plaintiff, notwithstanding the removal, and *an ac-* "*tion was then brought in the State court upon the re-* "*plevin bond.* It was held that the court of the United "States might enjoin the prosecution of such action, *the* "*relief being merely ancillary to the jurisdiction al-* "*ready acquired and necessary to give effect to its own* "*judgment.*"

(P. 273.) "It will be perceived that the principle in- "voked in such cases as *Gaylord* v. *Railroad Company* "and *Insurance Company* v. *Howell*, *supra*, is, that

"courts for the purpose of protecting their jurisdiction "over persons and subject-matter may enjoin parties who "are amenable to their process and subject to their juris- "diction from interference with them in respect of prop- "erty in their possession, or identical controversies there- "in pending, by subsequent proceedings as to the same "parties and subject-matter in other courts of concurrent "jurisdiction."

(P. 274.) "It is a rule of general application that "where property is in the actual possession of one Court "of competent jurisdiction such possession cannot be dis- "turbed by process out of another Court. This doctrine "has been repeatedly affirmed by this Court."

(P. 283.) "As between two Courts of concurrent and "co-ordinate jurisdiction, having like jurisdiction over "the subject matter in controversy, the Court which first "obtains jurisdiction is entitled to retain it without inter- "ference, and cannot be deprived of its right to do so "because it may not have first obtained physical posses- "sion of the property in dispute. *But where* the juris- "diction is not concurrent, and *the subject matter in "litigation in the one is not within the cognizance of "the other, while actual or even constructive possession "may, for the time being, and in order to avoid un- "seemly collision, prevent the one from disturbing such "possession, yet where there is neither actual nor con- "structive possession there is no obstacle to proceeding, "and action thus taken cannot be invalidated by rela- "tion.*"

By Mr. Justice Brewer (p. 286):

"And I may say that I agree further, that *when a "Court has possession of property it may restrain the "bringing of any suit in any other Court to disturb that "possession*, and that an order for such restraint operates

"upon all persons within its jurisdiction, and can be "enforced, if need be, by proceedings as for a con- "tempt."

Italics are ours.

Shields v. *Coleman* (157 U. S., 168), was this:

On the sixth of a certain June a bill was filed in the Circuit Court of the United States by a creditor of a railroad company alleging the insolvency of the company, and a receiver was appointed, who took possession of the railroad.

On the eighth of June, the railroad company giving a bond, the court discharged the receiver and delivered the railroad into the possession of the company.

On the twenty-eighth of the following October a bill was filed in the State court by another creditor, also alleging the insolvency of the company, and a receiver was appointed by the State court, who took possession of the railroad and kept it until it was taken from him on the fourteenth of the following November, by a receiver appointed, as next follows:

On the 12th of November following, the Circuit Court of the United States—in the suit which had been begun on the 6th of June—restored its receivership and appointed another receiver who, on the 14th of November, took the railroad from the possession of the receiver who had been appointed by the State court.

It will be observed that while the State court got possession first, the suit in the Federal court was begun first. Of course, the proceedings were identical in kind and the jurisdictions concurrent.

The Court held (157 U. S. 168—all the Justices concurring):

"A Circuit Court of the United States has not the power "to appoint a receiver of property already in the pos-

" session of a receiver duly and previously appointed by a " State court, and cannot rightfully take the property out " of the hands of the receiver so appointed by the State " court.

"The mere forcible continuance of possession wrong- " fully acquired by the Federal court does not transform " that which was in the first instance wrongful, into a " a rightful possession." (Head note, 157 U. S. 169.)

In *this* case, as will presently be shown, the railroad was in the possession of the State court, by its receiver, although the suit in the Federal court was the first begun.

In re Chetwood, 165 U. S. 443, the Court said, by Mr. Chief Justice Fuller, p. 460:

" The doctrine is firmly established that where the ju- " risdiction of a court, and the right of a plaintiff to " prosecute his suit in it. have once attached, that right " cannot be arrested or taken away by proceedings in " another court, *and that where property is actually in* " *the possession of one court of competent jurisdiction,* " *such possession cannot be disturbed by process out of* " *another court of concurrent jurisdiction.* *Moran* v. " *Sturges*, 154 U. S. 256 and cases cited."

Italics are mine.

In *Re Johnson*, 167 U. S. 116, the Court said, by Mr. Justice Brown (p. 125):

" We know of no reason why the rule, so frequently " applied in cases of conflicting jurisdiction between Fed- " eral and State courts, should not determine this ques- " tion. Ever since the case of *Ableman* v. *Booth*, 21 " How. 506, it has been the settled dotrine of this Court " that a court having possession of a person or property " cannot be deprived of the right to deal with such person " or property until its jurisdiction is exhausted, and that " no other court has the right to interfere with such cus-

" tody or possession. This rule was reaffirmed in *Tarble's* " *case*, 13 Wall, 397; in *Robb* v. *Connolly*, 111 U. S. 624; " and *In re Spangler*, 11 Michigan, 298; and with refer- " ence to personal property has been so often restated as " to have become one of the maxims of the law. *Taylor* " v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. " 450; *Ellis* v. *Davis*, 109 U. S. 485; *Kippendorf* v. " *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. " 176; *Byers* v. *McAuley*, 149 U. S. 608; *Moran* v. " *Sturges*, 154 U. S. 256; *In re Chetwood*, 165 U. S. " 443."

Abstract or Statement of the Case.

There was a mortgage upon the railroad to secure bonds to the aggregate of two millions of dollars. This mortgage was made to the Union Trust Company of New York as trustee.

One Sackett, who owned about nine thousand dollars of these bonds, brought an action, in the Supreme Court of New York, to which he made parties only the owner of the equity of redemption behind twenty-five millions of dollars of mortgages, and a trespasser who was in possession.

NOT the Union Trust Company and NOT any of the mortgagees.

That is to say, *he did not make a party of any one who had any real interest in the property.*

These twenty-five millions of dollars of mortgages came about in this way.

The Union Trust Company had brought an action to foreclose the two million mortgage, and got a regular judgment of foreclosure and sale under which the railroad was put up for sale, and a sale made—that is, if there can be a sale where the purchase money is not paid. A deed was made to the person who bid off the railroad—BUT *no part of the purchase money was ever paid.*

The person to whom that deed was given deeded the railroad to the New York, Boston and Montreal Railway Company which made the mortgages for the twenty-five millions of dollars. Of course as against that railway company the mortgages were good. It is that railway company which Sackett made a party to his suit.

The judgment in this action sweeps away all of these things, and adjudges that the original judgment of foreclosure and sale, got by the Union Trust Company, be enforced and that there be a re-sale under it.

Sackett got a receiver, who put out the trespasser—took possession, and then proceeded to issue certificates to the amount of three hundred and fifty thousand dollars, the proceeds of which he and the receiver and his other friends mostly divided up around among themselves. They then got a final judgment, against the owner of the equity of redemption behind the twenty-five millions of mortgages, and the trespasser, under which they sold the railroad, *subject to the principal of the receiver's certificates which the purchasers assumed to pay*, the sale bringing *just enough* to pay the *interest* on the certificates and the other debts of the receivership, *not a cent over*.

The principal coming due, the Central Bank of Boston—now plaintiff in error,—being the owner of the most of the certificates—brought an action in the Supreme Court of New York, against the purchasers, for a sale of the railroad and to charge the purchasers with any deficiency. It is plain that to this action the purchasers could not have any possible defense—except payment—of which there is no pretense. They moved the action into the Circuit Court of the United States, because of the diverse citizenship of the parties, and there it resulted in the decree which the judgment in this action enjoins them from proceeding under. The decree was for the sale of the railroad and over against the purchasers personally for any deficiency.

Matters being in this state, and *before* any advertisement for the sale of the railroad under that decree, this action was brought and in it a receiver was appointed who took possession of the railroad, and is still in possession when the record closes.

This sufficiently appears—the receiver is a witness and swears that he is in possession under an order in this action. This testimony was given in the month of June, 1891 (Record, pp. 449-50, 434). But it is said to have been read from "said printed case" (pp. 434, 448), and it appears that "said printed case" is the printed case "used at general term upon appeal from the first judgment" (p. 120), and by the report of that first appeal (*Stevens* v. *Union Trust Co.*, 57 Hun, 499), it

appears that that "first judgment was entered 24 January, 1890. It may be that I have no right to use this report; but, however that may be, it sufficiently appears that the receiver was in possession on the month of June, 1891. By the judgment in this action the receiver is continued and he is directed, upon the confirmation of the sale, to deliver possession to the purchaser and account to the court (Record, p. 115), and he is also for certain purposes made a party to the action (Record, pp. 118–119). That sale was not consummated by the delivery of the deed until 16 May, 1892, while the deed on the sale under the decree of the Circuit Court of the United States, was delivered 25 April, 1892 (Record, pp. 520–527). It thus appears that the receiver *was in possession when the sale was made under that decree.*

By the judgment in this action the judgment in the Sackett suit and all the proceedings in it, including the order for the issue of the certificates, *are reviewed and reversed* (Record, p. 113), and the sale under it is specifically set aside (p. 113). The usual injunction against any interference with the property by anybody claiming under that sale accompanies the reversal of the judgment and the setting aside of the sale and in particular, the certificate holders, plaintiffs in error here, *are enjoined from proceeding with the sale under the decree of the Circuit Court of the United States* (p. 114).

This is the great matter complained of.

Matters being in this condition, Mr. Peter Butler, as receiver of the Pacific National Bank of Boston, a party to this action, applied to Judge Wallace for an order directing the referee, notwithstanding the injunction, to proceed with the sale under the decree of the Circuit Court of the United States, and Judge Wallace made such an order (See his opinon, Papers on Motion to Dismiss or Affirm, pp. 74–80; 49 Fed. Rep., 293). And thereupon the referee sold to the defendant Foster, consummating the sale by a deed which was delivered 25 April, 1892 (Record, pp. 520–527), and the sale was confirmed by the Circuit Court of the United States. (Papers on Motion to Dismiss or Affirm, p. 98).

Afterwards the sale under the judgment in this action was made, also to the defendant Foster (Record, pp. 520–527), and the defendant Foster thereupon deeded all he

had got under both sales to the Lebanon Springs Railroad, a corporation, which thereupon moved in the Court of Appeals of New York to affirm the judgment in this action, and is one of the defendants in error here (Record, pp. 520–527).

A statement of the facts in full detail is given in the brief submitted on the motion to dismiss or affirm.

BRIEF OF THE ARGUMENT.

I.

If the relief against the sale under the decree of the Circuit Court of the United States cannot be given in this action it cannot be given at all—and the result is a complete failure of justice.

So far as this question is concerned, this action is a bill of review of the judgment and proceedings in Sackett's suit, that is to say, a judgment and proceedings of the Supreme Court of New York.

No such matter could possibly have been raised in the suit in the Circuit Court of the United States. Even if the defendants in that action had been otherwise in position to raise it, they would have been prevented from doing so by their contract by which they not only bought subject to the certificates, but *expressly agreed to pay them.*

But that is not all.

There is not any way in which an action could be brought in the Circuit Court of the United States in which such a matter could have been determined. The parties

could not possibly have been arranged so as to give jurisdiction by reason of citizenship,

> I suppose I have a right to have this presumed, in support of the judgment, from the absence of proof to the contrary, but whether that or no, the citizenship of enough of the parties can be picked out from the record to show this.

and the review and reversal of the judgment and proceedings in the Sackett suit does certainly *not* present any Federal question.

And even were it possible to so arrange the parties as to give the Circuit Court of the United States jurisdiction of such an action, *it has not yet been done.* On the other hand by the Supreme Court of New York *it has been done.* And surely that court is, out of all courts in the world, *the most appropriate* court to review and reverse one of its own judgments.

It follows then that the Sackett judgment has been rightly reviewed and reversed and the sale under it rightly set aside, and it further follows that any proceeding based upon that sale ought to be enjoined.

The court below having full jurisdiction of the matter has so decided, and it is to be supposed that every court would so decide.

But if it be right that such a proceeding should be enjoined, it cannot make any difference in what court it is.

It is the *proceeding* which ought to be enjoined, not the court. Suppose it had not happened that we had bought at the sale made by the Federal court? The result would have been that the judgment in this action would have settled nothing. The litigation would have gone on interminably, with this added difference, that the sale under the decree of the Federal court being unquestionable—as it must be if there be anything in the argument—and this judgment being right, as it must here be assumed to be, there would have been a deadlock forever. As the Court said in *Dietsch* v. *Huidekoper*, 103 U. S. 494: "*If the bill is not maintainable, the appellees would*

"*find themselves in precisely the same plight as if the* "*judgment of the United States Circuit Court in the* "*replevin suit had been against them instead of for* "*them.* The judgment in their favor would settle noth- "ing. Instead of terminating the strife between them "and their adversaries, it would leave them under the "necessity of engaging in a new conflict elsewhere. This "would be contrary to the plainest principles of reason "and justice" (p. 498).

Unless, therefore, there be an absolute want of jurisdiction, the injunction ought to stand.

That there is not such an absolute want of jurisdiction has been settled by the Court.

Marshall *v.* Holmes, 141 U. S. 589, was this: Mrs. Marshall owning lands in Louisiana, one Babcock, pretending to be her agent by virtue of a letter which it was claimed that she had written to him, under certain process of that State, charged her lands with a lot of judgments in favor of one Mayer. Mrs. Marshall thereupon brought a suit by petition in the State court of Louisiana, alleging that she had never written the letter and that the whole thing was a fraud. This suit, under the power given by the then Act of Congress, she moved into the Circuit Court of the United States and from the latter court an injunction issued.

The Court, speaking by Mr. Justice Harlan, said (141 U. S. 599):

"These authorities would seem to place beyond ques- "tion the jurisdiction of the Circuit Court to take cog- "nizance of the present suit, which is none the less an "original, independent suit, because it relates to judg- "ments obtained in a court of another jurisdiction. While "it cannot require the State court itself to set aside or "vacate the judgments in question, it may, as between "the parties before it, if the facts justify such relief, ad-

" judge that Mayer shall not enjoy the inequitable advan-
" tage obtained by his judgments. A decree to that effect
" would operate directly upon him, and would not con-
" travene that provision of the statute prohibiting a court
" of the United States from granting a writ of injunction
" to stay proceedings in a State court. It would simply
" take from him the benefit of judgments obtained by
" fraud."

The ruling in the case of *Dietzsch* v. *Huidekoper*, 103 U. S. 494, is thus described by the Court, speaking by Mr. Chief Justice Fuller, in *Moran* v. *Sturges*, 154 U. S. 270.

" So in *Dietzsch* v. *Huidekoper*, 103 U. S. 494, a plain-
" tiff in replevin suit brought in a State court had prop-
" erly removed it to the Federal court and obtained a
" judgment there in his favor, but the State court pro-
" ceeded to try the cause and render judgment against the
" plaintiff, notwithstanding the removal, and *an action*
" *was then brought in the State court upon the replevin*
" *bond.* It was held that the court of the United States
" *might enjoin the prosecution of such action, the relief*
" *being merely ancillary to the jurisdiction already*
" *acquired and necessary to give effect to its own judg-*
" *ment.*"

Italics are mine

But is not this relief merely ancillary to the jurisdiction already acquired—namely, the jurisdiction to set aside the judgment in the Sackett suit and the sale under it—and necessary to give effect to this, its own judgment?

This question has long been settled in England.

Carron Iron Co. *v.* McLaren, 5 HLC, 416, by
Lord Cranworth, 439
by Lord St. Leonards, 452–455.

And—confining what is now to be said solely to the question of jurisdiction, and assuming that the injunction

would have been not only entirely proper, but that equity would have required it to issue, if the decree of the Circuit Court of the United States had been a judgment of the Supreme Court of New York—I do submit this:

There is not anything in the Constitution of the United States which takes away from the Supreme Court of New York its power to pronounce a judgment upon parties over whose persons it has jurisdiction, in a case as to which exclusive jurisdiction of the subject matter has not been granted to the Federal courts.

And there is thus not anything to prevent it from pronouncing a judgment enjoining the parties before it from proceeding in the courts of the United States.

II.

The railroad being in the actual possession of the Supreme Court of New York, that court had the right to protect its possession by the injunction.

This is a somewhat narrower ground than the other, but entirely well settled by the Court.

In *Moran* v. *Sturges*, 154 U. S. 256, and *Shields* v. *Coleman*, 159 U. S. 168, the court held that the court which first obtained the actual possession of the property had the right to administer it, although in both cases the proceeding in the other court had been first begun.

And in *Moran* v. *Sturges*, Mr. Justice Brewer said (154 U. S. 286): "And I may say that I agree further that "when a court has possession of property it may restrain

"the bringing of any suit in any other court to disturb "that possession, and that an order for such restraint "operates upon all persons within its jurisdiction, and "can be enforced, if need be, by proceedings as for a con- "tempt."

And in *Re Johnson*, 167 U. S. 116, the court used the language already quoted.

For the detail of the argument, and as to the other assignments of error, the Court is respectfully asked to read the brief on the motion to dismiss or affirm.

The judgment should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

MOTION

In the Supreme Court of the United States,

OCTOBER TERM, 1895.

NUMBER 568.

THE CENTRAL NATIO[illegible]L BANK OF BOSTON and o[illegible]ers,
Plaintiffs in Error,

against

AARON R. STEVENS, IDA S. HARRISON, THE LEBANON SPRINGS RAILROAD and others,
Defendants in Error.

MOTION TO ADVANCE.

This case is pending on a writ of error to the Court of Appeals of New York and the return to that writ.

The action was brought to enforce a judgment and two decrees, made more than twenty years ago, foreclosing a mortgage upon the Lebanon Springs Railroad. The railroad had been sold under that judgment and those decrees to a purchaser who had not paid the purchase money, but nevertheless had got his deed—and under the color of that deed the railroad had been sold four times and mortgaged again and again. The judgment in this action swept away a great mass of conveyances, mortgages and receiver's

certificates—the entanglements of the title during twenty years—and adjudged the enforcement of the original foreclosure judgment and decrees, and a resale of the railroad under them—thus restoring the property to the lien of the original mortgage.

The railroad was bought at the sale by a reorganization Trustee, who, in the execution of his trust, conveyed it to the Lebanon Springs Railroad, a New York corporation and one of the defendants in error.

The Federal question is this:

An action had been brought in the Supreme Court of New York to foreclose one of the junior liens—a lien originally created by an order and continued by a judgment of that Court. This action was removed into the Circuit Court of the United States by reason of the citizenship of the parties, and in due time proceeded to a decree foreclosing the lien and directing the sale of the railroad under it, and that sale was being advertised at the time the judgment in this action was made.

The judgment in this action swept away the lien itself, which the decree of the Circuit Court of the United States foreclosed, and which, as has been originally stated, owed its origin wholly to the Supreme Court of New York; and as an incident to that relief, *it enjoined* all the parties to the action, included in whom were *all the parties to the decree in the Circuit Court of the United States, from proceeding with the sale under that decree.*

The question was thus presented whether the Supreme Court of New York can, *under any circumstances*, enjoin parties before it from proceeding under a decree which they have got in the Circuit Court of the United States.

This is the Federal question, and though, doubtless, in the abstract a question of great importance, it is to the parties to this action of not the slightest consequence:

Because, notwithstanding that injunction, the Circuit

Court of the United States directed the Master to go on with the sale under the decree. The Master did so. The sale was made, and to the same reorganization trustee, who, in the execution of his trust, conveyed the title thus acquired as well as that which he acquired under the judgment in this action, to the Lebanon Springs Railroad, one of the defendants in error.

To the Lebanon Springs Railroad, now the only party in interest among the defendants in error, it is therefore of no sort of consequence whether the part of the judgment which adjudged the injunction be reversed or whether it be affirmed. In either event it owns all the title which that decree could give.

> The theory which the plaintiffs in error have expressed, is this: Their decree, besides adjudging the sale of the railroad, was also for the deficiency on the sale against William Foster, Jr., one of the defendants below, personally. They say that Mr. Foster now claims that the sale, being in violation of the injunction, was void, and that, unless the part of the judgment which adjudged the injunction be reversed, the sale being thus void, *the amount of the deficiency will still remain unascertained, and they cannot issue execution against Mr. Foster for the deficiency since, they do not know what the deficiency is.*
>
> To this there are the following answers:
>
> Mr. Foster was the reorganization trustee above referred to. He bought at the sale under that decree, and paid his money, which was received by the plaintiffs in error, and which they still retain. Mr. Foster then sold to the defendant in error—The Lebanon Springs Railroad—and was paid the money agreed upon, which he still retains. Under these circumstances it will hardly be permitted to either of them to question the validity of their deeds *as against their own grantee*, and quite certainly *not while they both keep the money.*
>
> Another answer—If the plaintiffs in error cannot issue an execution against Mr. Foster, because the amount of the deficiency is not ascertained, this will not prevent them from suing him at law for the whole debt.

We ask that the case be advanced, because a long-pending litigation relating to an entire railroad cannot be terminated until the questions now presented are determined, but will then be finally disposed of. The rights asserted by the plaintiffs in error constitute a cloud upon the title of the entire railroad—and wholly prevent the financing of the reorganized railroad and even the payment of the taxes; under sales for which title to more than three-fourths of the railroad will pass to the pur-

chasers at the tax sales before this case can be reached in its regular order.

Notice of this motion has been duly served upon counsel for the plaintiffs in error and proof of service filed with the Clerk.

EDWARD WINSLOW PAIGE,
Counsel for Defendants in Error.

March, 1896.

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS and others.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO AMEND THE MANDATE.

Those parts of the opinion of the Court, which we submit to be pertinent to this motion, are annexed. We submit that they show that the Court intended to reverse the judgment in the two particulars only which are described in it. The mandate, however, commands the reversal of the whole judgment.

The defendants in error move to amend the mandate so that it conform to the opinion.

It is the opinion of the counsel who signs this brief that it is decidedly for the interest of the defendants in error that the motion be denied.

And for the following reasons:

The whole judgment being reversed—there must inevitably under the laws of New York, be a new trial of the whole action. As the defendants in error might succeed in the new trial in all matters except those described in the opinion of the Court—as to be reversed—there would be a general judgment in favor of the defendants in error like the present judgment, except that it would omit the injunction and the provision about the plaintiffs in error proving their certificates. Under that judgment there would

of course be a new sale and the bondholders could then buy through the medium of a trustee other than Mr. Foster, thus relieving the case from the difficulty described by the italicised portions of the parts of the opinion annexed.

It would also relieve the defendants in error from paying the costs of the Court, since there is not any way under the laws of New York by which a successful plaintiff can be made to pay costs to the defendant.

And they can also show, although as we submit the present record shows, that not any of the proceeds of the certificates went into the property—nevertheless we make the motion.

EDWARD WINSLOW PAIGE,
Of Counsel.

Come now the defendants in error and move the Court that the annexed mandate be amended so as to command that the judgment below be reversed only in the particulars described in the opinion of the Court.

IN THE SUPREME COURT OF
THE UNITED STATES.

Ninth of May, one thousand eight hundred and ninety-eight.

Extracts from the Opinion

(169 U. S. 432,)

(p. 456): "The certificates were sold, and the proceeds "expended under the approval of the Court."

(p. 458): "Thus the singular result, thus far reached, "of this protracted and expensive litigation, *is that Fos-* "*ter*, who had with Hazard been the purchaser at the "Sackett sale, *has become the owner of the railroad upon* "*the payment of a merely nominal sum, and that the* "BONDHOLDERS and the owners of the certificates *have* "*realized nothing.* And it further thus appears that ever "since May 16, 1892, the controversy has really been be- "tween the holders of the receiver's certificates and "*Foster, who has, for a trifling sum, become the owner* "*of the railroad as improved by money procured by the* "*sale of the certificates.*

"*It may be that Foster, when he bought under the de-* "*cree of sale, in the present suit, did so in pursuance of* "*some arrangement with the bondholders and* AS THEIR "TRUSTEE. But whether Foster, when he bought under "the decree of the Circuit Court of the United States, "subjected himself to that feature of the decree that "made him personally liable for the unpaid portion of the

"certificates, and precluded himself from relying on the "decree of the Supreme Court of New York setting aside "the Sackett sale, and whether the setting aside of the "sale in the Sackett suit would invalidate receiver's cer- "tificates issued years before *and whose proceeds had "gone into the improvement of the property*, and whether, "in case of Foster's inability to respond to his personal "obligation, the unpaid portion of the certificates would "be a lien on the railroad in his hands *and in those of "his vendees*, are questions for the Circuit Court of the "United States, which cannot be withdrawn from its de- "termination by the subsequent proceedings in the Su- "preme Court of New York. Any confusion that might "otherwise have arisen by reason of conflicting views be- "tween the Federal and state courts has been prevented "by the fact that *Foster*, who himself originally invoked "the jurisdiction of the Circuit Court of the United States, "*has become the purchaser of the railroad under the de- "crees of both courts, whereby the only substantial con- "troversy that remains is between him, as such pur- "chaser, and the holders of the certificates.*"

The opinion ends (p. 465) with these words:

"The conclusions we have reached are that the judg- "ments of the Supreme Court of New York and of the "Court of Appeals affirming the same are erroneous in so "far as they command the Central National Bank of "Boston, the Massachusetts Mutual Life Insurance Com- "pany and other holders of the receiver's certificates, "whose rights, as such holders, were adjudged by the "Circuit Court of the United States, to appear before the "referee appointed by the Supreme Court in the present "case, and which enjoin the Central National Bank of "Boston and others, whose rights have been adjudged by "the Circuit Court of the United States for the Northern

"District of New York, from proceeding with the sale "under the decree of that court, are erroneous.

"*The judgment of the Supreme Court of New York* "*and of the court of Appeals, in these particulars, are* "*accordingly reversed, and the cause is remanded to* "*that court for further proceedings not inconsistent* "*with the opinion of this court.*"

Mandate.

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Honorable the Judges of the Court of Appeals
(L. S.) *of the State of New York*, GREETING:

WHEREAS, lately in the Court of Appeals of the State of New York, before you or some of you, in a cause between The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as Receiver of the Pacific National Bank of Boston, *et al.*, Appellants, and Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison, respondents, wherein the judgment of the said Court of Appeals, entered in said cause on the 27th day of November, A. D. 1894, is in the following words, viz.:

"On the 27th day of November, 1894, judgment was duly given and rendered in and by said Court of Appeals whereby the said judgment of the said Supreme Court was in all things affirmed with costs."

as by the inspection of the transcript of the record of the said Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of error sued out by said appellants agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said Court of Appeals in this cause be, and the same is hereby reversed with costs; And that the said appellants recover against the said respondents, Aaron R. Stevens *et al.*, One thousand and forty seven dollars and seventy cents, for their costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Court of Appeals for further proceedings not inconsistent with the opinion of this Court.

MARCH 7, 1898.

And the same is hereby remanded to you the said Judges of the said Court of Appeals of the State of New York, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

COST OF APPELLANTS.	
Clerk.....	$453.70
Printing record..	574.00
Attorney.....	20.00
	$1,047.70

JAMES H. MCKINNEY,
Clerk of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

COSTS OF THE CENTRAL NATIONAL BANK OF BOSTON ET AL.

In No. 38.

1894.	October Term—Docketing cause and filing record $5.00; appearance .25; filing precipe .25; filing papers $1.00; continuance .25	6.75
1895.	October Term—Transfer $1.00; filing papers $2.50; filing briefs $5.00; submission .20; continuance .25	8.95
1896.	October Term—Transfer $1.00; appearance .25; filing precipes and receipts $1.50; filing papers $3.25; filing stipulation .25; continuance .25	6.50
1897.	October Term—Transfer $1.00; appearance .25; filing precipes .50; filing papers $5.00; filing briefs $5.00; argument .20; judgment $1.00, filing same .25; recording .40; mandate $5.00; preparing record for printer etc. $412.50; cost of printing record, $574.00; attorneys docket fee, $20.00; costs and copy .40	1025.50
		$1047.70

Fee Book, page 15, 841.

Test: JAMES H. MCKENNEY,
Clerk Supreme Court U. S.

SIR:

You will take notice that the motion above described will be made to the Supreme Court of the United States in the Capitol on the ninth day of May, one thousand eight hundred and ninety-eight, at the opening of the Court, or as soon as counsel can be heard.

Yours very truly,

EDWARD WINSLOW PAIGE,
Attorney for the defendants in error.

To Mr. ALPHEUS T. BULKELEY,
Attorney for the plaintiffs in error.

CENTRAL NATIONAL BANK *v.* STEVENS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 38. Argued October 15, 1897. — Decided March 7, 1898.

In August, 1880, Sackett brought suit in the Supreme Court of the State of New York, on behalf of himself and all other holders and owners of bonds of certain railroad companies against Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and David Butterfield, receiver of said company, praying for the appointment of a receiver and for a sale of the railroad and franchises for the benefit of the bondholders. On October 11, 1880, a receiver was appointed and qualified. On April 2, 1881, on petition of the receiver, and after a report by an expert disclosing the necessity for expenditure to make the road safe and to enable trains to be run, an order was made by the court authorizing the receiver to issue and negotiate $350,000 in certificates, the same to be a first lien. The certificates were sold, and the proceeds expended under the approval of the court. On June 12, 1885, sale was made of the road and deed delivered to Foster and Hazard for $155,000, subject to the payment of the unpaid portion of the principal and interest of the certificates. On April 9, 1886, the Central National Bank of Boston brought suit in the Supreme Court of New York, on its own behalf and that of others as owners of the certificates, against Foster, Hazard, the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company. On March 24, 1887, the suit having been transferred on the petition of the defendants to the Circuit Court of the United States, after full hearing and argument the latter court rendered a final decree, establishing the rights of the Central National Bank of Boston and of others as owners of said certificates, declaring the latter to be a first lien, decreeing that Foster and Hazard were liable for any deficiency if the sale should fail to realize enough to

Statement of the Case.

pay certificates. On March 23, 1892, sale under said decree to Foster for $7500, and on April 25, 1892, deed of conveyance by referee to Foster, were made. On December 8, 1890, Stevens and others brought their suit in the Supreme Court of New York against the Central National Bank of Boston, the other holders of certificates, Foster, Hazard and others, to set aside the decree in Sackett's case and to enjoin proceedings in the Circuit Court of the United States. November 11, 1891, judgment setting aside the sale in Sackett's case and finally enjoining the Central National Bank and others, plaintiffs in the Circuit Court of the United States, from selling under the decree of the Federal court. On May 16, 1892, sale and conveyance were made by referee under the decree in the present suit to Foster. On May 9, 1893, judgment of the general term was rendered, and November 27, 1894, judgment of the Court of Appeals, each affirming the judgment of the Supreme Court, *Held* that the judgment of the Supreme Court of New York and of the Court of Appeals affirming the same are erroneous in so far as they command the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company and other holders of the receiver's certificates whose rights, as such holders, were adjudged by the Circuit Court of the United States, to appear before the referee appointed by the Supreme Court in the present case, and which enjoin the Central National Bank of Boston and others, whose rights have been adjudged by the Circuit Court of the United States for the Northern District of New York, from proceeding with the sale under the decree of that Court.

THE Lebanon Springs Railroad Company was organized in the year 1852, and, by virtue of various acts of the legislatures of New York and Vermont, was authorized to construct and maintain a railroad extending from Chatham, New York, to Bennington, Vermont. On the 1st day of July, 1867, the said company duly executed and delivered to the Union Trust Company of New York a mortgage of that date on all its property, rights and franchises, to secure the payment of bonds to the amount of two million of dollars, which bonds were then or soon after sold to a great number of persons. In January, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington and Rutland Railroad Company, under the name and style of the Harlem Extension Railroad Company. The new company, on April 1, 1870, executed and delivered to the said Union Trust Company a mortgage on its road and franchises to secure bonds to the amount of four million dollars. Of these bonds there were sold to outside parties to the amount of one million five hundred thousand dollars. The

remaining two million five hundred thousand dollars of bonds were reserved to take up and be exchanged for the two million dollars of bonds of the Lebanon Springs Railroad Company and for five hundred thousand dollars of bonds which had been issued by the Bennington and Rutland Railroad Company, but such exchange never took place, and accordingly only one million five hundred thousand dollars of the said bonds of the Harlem Extension Railroad Company were ever issued. Both said mortgages were duly recorded in the proper counties in the States of New York and Vermont.

On February 22, 1872, the interest upon the said bonds of the Lebanon Springs Railroad Company falling due after January, 1869 not having been paid, the Union Trust Company of New York began an action in the Supreme Court of New York to foreclose the mortgage of that company, in which action the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants.

On November 15, 1872, the Union Trust Company of New York filed bills in the Court of Chancery in the State of Vermont to foreclose both of said mortgages, in which actions the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants, and said defendants duly appeared in that court prior to December 1, 1872.

While the above-mentioned actions were pending, and on December 18, 1872, the Harlem Extension Railroad Company and the Pine Plains and Albany Railroad Company, a corporation of the State of New York, consolidated their roads, property and capital stock, under the name of the Harlem Extension Railroad Company; and on December 19, 1872, the New York, Boston and Northern Railroad Company and the said last named the Harlem Extension Railroad Company duly consolidated their roads, property and capital stock, and thus formed one company under the name of the New York, Boston and Montreal Railway Company.

The above-mentioned foreclosure suits were so proceeded with that, in the said action in the Supreme Court of New York, a judgment of foreclosure of the said mortgage given by the Lebanon Springs Railroad Company, and for a sale of

its road, property and franchises within the State of New York, and of all its right, title and interest to the railroad and franchises within the State of Vermont, was rendered on December 10, 1872; and on January 25, 1873, the property and franchises mentioned were sold to one William Butler Duncan for the price of one hundred thousand dollars, and on said day, Charles S. Fairchild, the referee appointed by the court to effect the sale, executed and delivered to one James C. Hull his deed of conveyance of the said road, property and franchises, bearing date the said 25th January, 1873, and said deed was duly recorded in the clerks' offices for the counties of Rensselaer and Columbia.

On the 7th day of December, 1872, decrees of foreclosure of the mortgage of the Lebanon Springs Railroad Company and of the Harlem Extension Railroad Company's mortgage, and directing a sale, were rendered; and in pursuance of such decrees the said road, property and franchises within the State of Vermont were, by Daniel McEwen, a special master in chancery, appointed by the court for that purpose, sold on January 20, 1873, to one Charles G. Lincoln, for the sum of fifty thousand dollars, and deeds of conveyance of that date were made and delivered to said Lincoln by the said master in chancery.

On January 28, 1873, Hull and Lincoln, the respective purchasers at the said foreclosure sales, executed and delivered to the said William Butler Duncan and to one Trenor W. Park a bond in the sum of five million dollars, and a mortgage to secure the same on all the roads, property and franchises of the Harlem Extension Railroad Company, including those of the Lebanon Springs Railroad Company and of the New York and Vermont Railroad Company.

On January 30, 1873, Hull and wife, by their deed executed and delivered that day, conveyed all said roads, property and franchises, situated in the State of New York, to the said the New York, Boston and Montreal Railway Company, subject, however, to said mortgage to Duncan and Park; and, on the same day, Lincoln, by a deed executed and delivered by him, conveyed said roads, property and franchises, situated in the

State of Vermont, to the said the New York, Boston and Montreal Railway Company, subject to the said mortgage to Duncan and Park, and to the said five hundred thousand dollar mortgage on the old Bennington and Rutland Railroad.

The New York, Boston and Montreal Railway Company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which had become wholly due and payable on or before February 1, 1875, but has never paid the remainder of the money due on said bond and mortgage.

On March 15, 1873, the New York, Boston and Montreal Railway Company executed and delivered a certain other mortgage in the amount of twelve million two hundred and fifty thousand dollars to Seligman, Sherman and Brown as trustees. This mortgage covered the above-mentioned railroad and other properties. On the 1st day of April, 1873, the New York, Boston and Montreal Railway Company executed and delivered still another mortgage on the said railroad and other things in the amount of twelve million seven hundred and fifty thousand dollars, in which the New York Loan and Indemnity Company was named as trustee. Enough of the bonds of the said last two mortgages were sold to realize six millions of dollars, which were received and disbursed by Seligman and Brown. The said railroad was operated by and on behalf of the New York, Boston and Montreal Railway Company until some time in November, 1873, when said company leased the road to the Central Vermont Railroad Company, by which it was operated until August 20, 1877, when said last-mentioned company withdrew from the possession of and abandoned the road. In the meantime the New York, Boston and Montreal Railway Company had failed to fulfil its obligations and had become wholly insolvent, and said railroad, when surrendered and abandoned by its lessee, lay unoccupied and unoperated until some time in September, 1877, when it was taken possession of by one Russell C. Root, who subsequently, in November, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company, a corporation of the State of New York, and of which said Root was president,

and which continued to operate said railroad until it came into the possession of John W. Van Valkenburgh as hereinafter stated.

On September 7, 1889, one Marvin Sackett, claiming to be the owner of bonds to the amount of $8700, issued, as before mentioned, by the Lebanon Springs Railroad Company, brought an action in the Supreme Court of New York against the said Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as receiver of the said last-mentioned company, praying for the sale of the whole of the said railroad property and franchises. He claimed to bring the action in behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who held any of the two million of dollars of the bonds of said company. He alleged in his complaint the fact of the mortgage, to secure his bonds, among others, to the Union Trust Company of New York, its actions to foreclose the sales under them, the aforesaid sales to Hull and Lincoln, and their mortgage to Park and Duncan, and the conveyance by the latter to the New York, Boston and Montreal Railway Company, and that Hull and Lincoln, and Park and Duncan, acted throughout all those matters as the agents and representatives, and for the use and benefit of the bondholders of the Lebanon Springs Railroad Company.

The summons and complaints were served upon the New York, Boston and Montreal Railway Company and upon Butterfield as receiver, but they did not appear. Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company were also served, and they put in joint answers on September 25, 1880. On October 1, 1880, the complainant Sackett moved for the appointment of a receiver, and on October 7, John W. Van Valkenburgh was appointed and filed his bond as receiver.

On November 12, 1880, one Bloodgood and six others, claiming to own a majority of the bonds of the Lebanon Springs Railroad Company, moved for leave to be made

parties to the action. This motion was, on January 10, 1881, denied, but the plaintiff was directed to serve papers and notices of every kind on one F. L. Westbrook, who was by the order authorized to appear as counsel of the said Bloodgood and the other six bondholders, upon all trials, hearings and motions. On November 6, 1880, Park and Duncan made an application to the court to be made parties to the action, alleging that they were the owners of over $300,000 of bonds of the Lebanon Springs Railroad Company, and of over $600,000 of bonds of the Harlem Extension Railroad Company, and that they were the mortgagees under the mortgage made by Hull and Lincoln. This application was not granted. One Henry A. Tilden, who claimed to own thirty of the bonds of the Lebanon Springs Railroad Company, was associated with Sackett in the bringing of said action, and appeared by counsel. On October 11, 1880, the receiver filed a petition, setting forth that he had no funds with which to equip or operate the road, and asking that he might be allowed to borrow $25,000 on certificates for that purpose, and on October 25, 1880, the court made an order authorizing the receiver to borrow $25,000 on certificates, which were declared to be a first lien on the net profits of the railroad company. On February 23, 1881, the receiver filed a petition setting forth that there were large arrears of taxes, for which sales had taken place of portions of the road, that there was a necessity for the purchase of rails and superstructures, and praying that he might be authorized to issue certificates to raise the necessary moneys to redeem such portions of the road as has been sold for taxes, and to purchase rails and make other necessary repairs. Notice of this petition was filed on Hamilton Ward, attorney general of the State of New York; on McClellan and Brown, attorneys for Sackett, the plaintiff; on P. W. Ostremder, attorney for R. C. Root, defendant, and on F. W. Westbrook, attorney designated to receive notices on behalf of Bloodgood and others.

On March 5, 1881, the court, after hearing Edward Newcomb, of counsel for said receiver, and F. L. Westbrook, of counsel in opposition thereto, appointed James H. Jones, an

expert, to examine the rails, ties, bridges, roadbed, trestles, telegraph poles and all matters pertaining to the running of the Lebanon Springs Railroad, to the end that he should make a report to the court of the true condition of the Lebanon Springs Railroad, with his opinion thereon as to what was necessary and requisite for the protection of said property and the safety and successful running of said railroad; that said report be made to said receiver, and that said receiver should return said report, together with a detailed statement of moneys received and expended by him, with such other information as he should have in relation to said railroad; and further directing that said reports and papers should be served on F. L. Westbrook ten days prior to the hearing on said report before the court.

On March 19, 1881, James H. Jones made an elaborate report to the receiver, stating that he had, in pursuance of his appointment, made a careful examination of the said railroad, its rails, ties, bridges, roadbed, trestles, telegraph poles and all matters appertaining to the running and management thereof; that he found the rails of iron worn to such an extent as to render the running of trains, even at an ordinary rate of speed, extremely dangerous; that to render the track safe for ordinary use would require from 2500 to 3000 tons of new rails to replace the poorer conditioned of the old ones; that the ties were badly decayed, to replace which would require about 87,000 new ties; that the road required new ballasting; that the bridges and trestles were in an unsafe condition, all needing repair; that to repair the bridges and trestles and abutments would require an expenditure of some $19,000; that new telegraph poles to the number of 2030 were required; that, in fine, to put said road in a condition to render its operation safe and successful would require about $320,000. This report was returned to court by the receiver, with a statement of his receipts and expenditures to date, and on April 4, 1881, the court, after considering said reports and hearing counsel for the receiver, and no one appearing in opposition thereto, ordered the receiver to put said road in repair as recommended by the report of James H. Jones, and

authorized him to issue receiver's certificates, dated April 2, 1881, with interest at six per cent, for the aggregate amount of $350,000, the same to be signed by said John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, and a certificate on each thereof duly to be signed by an officer of the Farmers' Loan and Trust Company of New York City. It was further ordered that the said receiver should negotiate said certificates, and with the money arising therefrom pay and discharge the $25,000 of certificates theretofore authorized by the order of October 25, 1880, and to purchase all necessary materials for the repairs of said road, and pay and discharge all necessary expenses incident to said repairs. It was further ordered that said receiver's certificates of indebtedness should be declared to be a debt of the receiver incurred for the benefit and protection of said Lebanon Springs Railroad and its owners and the bondholders thereof, and said certificates were declared and decreed to be a first lien on the railroad and every kind of property owned by the company, to be recognized as such in any reorganization of the company or in its consolidation with any other company; and in case of any sale of the said railroad, the property in the hands of the receiver, and the franchises, under any decree of the Supreme Court, the said certificates are to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and cancelled by him from the earnings of the railroad; but in case said railroad and property in the hands of the receiver and franchises, on any sale thereof, does not bring sufficient to pay the full amount and interest then due on the outstanding negotiated certificates, then such unpaid amount shall remain as a first lien on the road, property and franchises in the hands of the purchaser.

On January 12, 1885, a final decree of sale was made, appointing George McClellan as referee to make such sale, and providing, among other things, that sale should be made subject to the payment of the undue principal and interest of the receiver's certificates, and that the purchaser of the railroad and franchises should take said railroad, property and franchises, subject to the unpaid portion of said certificates,

which should be assumed by such purchaser as part of the consideration of the purchase.

On June 29, 1885, George McClellan, the referee, reported to the court that he had effected sale, in accordance with the terms of the decree of sale, to one William Foster, Jr., trustee, for the sum of $155,000, and that, among the terms of the sale, it was stipulated that William Foster, Jr., trustee, should take the property and assets, subject to the payment of the undue principal and interest of the receiver's certificates.

Subsequently, the referee executed and delivered to William Foster, Jr., and Rowland N. Hazard, as purchasers, a deed of conveyance, and received from them $155,000, the amount of their bid; and it appears that, out of the amount of said purchase money, there was then paid about $60,000, the interest then due on said certificates. Afterwards, it appears by the record, that Foster and Hazard conveyed the railroad, property and franchises to the New York, Rutland and Montreal Railway Company, to which company Reynolds, who had succeeded Van Valkenburgh as receiver, surrendered possession of the railroad. The balance of the purchase money was used and applied as directed by the judgment in the said Sackett suit.

The principal of said certificates became due on the 1st day of April, 1886, and was not paid. Thereupon, in the month of April, 1866, the Central National Bank of Boston brought an action in the Supreme Court of New York in behalf of itself as well as other holders of receiver's certificates, against William Foster, Jr., Rowland N. Hazard, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company of New York. All of the defendants in said action appeared and answered. After issue was joined, the said action was, on the petition of the defendants, duly removed into the Circuit Court of the United States for the Northern District of New York.

The complaint alleged in substance that the plaintiff is a banking association duly organized and incorporated under the laws of the United States, located and doing business in the city of Boston, in the Commonwealth of Massachusetts.

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It alleged the making of an order on or about April 2, 1881, by the New York Supreme Court in the Sackett suit, whereby one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, was authorized and directed to issue under his hand receiver's certificates of indebtedness, dated April 2, 1881, with interest at six per cent, of $500 each, payable in five years, interest payable January 1 and July 1 in each year, to the aggregate amount of $350,000, such certificates and the interest coupons thereto attached made payable at the Farmers' Loan and Trust Company in the city of New York, and whereby it was further ordered that the receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon pay and discharge certain previous certificates theretofore authorized by an order of the same court, and from the moneys arising from said certificates, that said receiver purchase all necessary materials for the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found due to claimants by the referee named in said order; that it was further provided in said order that the said receiver's certificates of indebtedness to the amount therein directed to be issued, be and the same were thereby declared to be a debt of the said receiver, incurred for the benefit and protection of the said Lebanon Springs Railroad and its owners and bondholders, and said certificates to the amount of $350,000 were by said order declared to be a first lien on the railroad and all and every kind of property owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any reorganization of the company, and that in case of any sale of the railroad, the property in the hands of the receiver, and franchises under any decree of the Supreme Court, said certificates were to be first paid from the first moneys realized therefrom by said receiver, unless sooner paid and cancelled by him from the earnings of said railroad. It was further provided in said order that in case said railroad property in the hands of

the receiver and franchises on any sale thereof should not bring sufficient to pay the full amount of principal and interest then due on the outstanding negotiated certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver, and franchises, should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid with interest thereon, referring to the original order or the record thereof.

The complaint further alleged that the said Van Valkenburgh, as receiver, under and in pursuance of said order, did issue and negotiate such certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from said certificates to the uses and purposes mentioned and in said order authorized; that the plaintiff is now and has for several years last past been the owner and holder of said certificates, amounting in the aggregate to $250,000 of principal thereof, and that the certificates issued and negotiated by the receiver which are not held by plaintiff, are held by divers persons and corporations, many of whose names are unknown to the plaintiff.

The complaint further alleged that in the said Sackett suit the plaintiff appeared by its attorneys on the trial of the issues and made proof in regard to the issuing of said certificates and its title thereto, and that such proceedings were had therein that a judgment was rendered on or about January 12, 1885, by which it was, among other things, adjudged and decreed that the said certificates, amounting in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the railroad and its property, as provided in the said order, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in said judgment provided for, and whereby it was further adjudged and decreed that the property, franchises and rights of the said railroad company as described in a certain mortgage therein referred to, and in the judgment in said Sackett suit, and all the right, title and interest of any and of

all the parties to the said action, including all property and assets in the hands of said receiver, be sold at public auction under the direction of a referee therein named, for the benefit of the first mortgage bondholders of said railroad company issued July 1, 1867, for the amount of $2,000,000, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and should assume, as part of the consideration of the purchase, the payment thereof, and from the avails of said sale, after the payment of certain expenses therein provided for, the said referee should pay the amount of interest due on said receiver's certificates; that under and in pursuance of said judgment, the referee named therein did advertise for sale on the 12th day of June, 1885, and did sell at public auction, the premises, rights, franchises and property in said judgment mentioned and described, to the defendants, William Foster, Jr., and Rowland N. Hazard, who became the purchasers thereof for the price of $155,000, and that the said William Foster, Jr., acting on behalf of himself and said Hazard, did pay the referee five per cent of the purchase price and did subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did, for himself and said Hazard, assume and agree to pay the amount of said principal and interest on said certificates of indebtedness as part of the consideration of said purchase; that the balance of said $155,000 was thereafter paid by the purchasers to the referee, and that the referee did thereafter duly execute and deliver to the defendants Foster and Hazard a deed of said premises and property in said judgment described, and paid from the said $155,000 the interest then due on said certificates, amounting to about $60,000.

Plaintiff further alleged in said complaint that said referee's deed was duly accepted by the defendants Foster and Hazard, and that in and by the deed, the grantees therein, the defendants Hazard and Foster, took said premises and property

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subject to the unpaid principal and interest on the receiver's certificates, as required by the judgment aforesaid; that the principal of said certificates with interest from January 1, 1886, became due and payable on the 2d day of April, 1886, and that on that day the said certificates, amounting to $250,000, held by the plaintiff, were duly presented to the Farmers' Loan and Trust Company of the city of New York, where the same were payable, and payment thereof was demanded, but the same was refused, and that the whole of said principal with interest from the 1st day of January, 1886, is now due and unpaid. The complaint then gives a description of the railroad premises mentioned in the judgment in the Sackett suit and in the referee's deed; alleges that the defendants or some of them are now in possession of the property above described, and are using and operating the same for railroad purposes, and that all the defendants have or claim to have some interest in or lien upon said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said certificates, and that there is now justly due the plaintiff upon said certificates held by it the sum of $250,000, with interest from January 1, 1886.

The complaint then prays that the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon said premises; asks for the usual judgment of foreclosure, for a receiver and for a sale, and that out of the moneys arising from the sale of said premises, plaintiff and other holders of said certificates who may come in and prove their title thereto and the amount due thereon may be paid the amount due on said certificates with interest and costs, so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Hazard and Foster may be adjudged to pay any deficiency that may remain after applying said moneys so applicable thereto, and for general relief.

The defendants all appeared and answered. Hazard and Foster answered separately, admitting their purchase substantially as alleged in the complaint, controverting some of the other allegations, and setting up as a distinct defence that

they acquired the property mentioned in the plaintiff's complaint with notice that the receiver's certificates were outstanding and of the sum justly due therefor, and that they have ever since been and now are ready and willing to pay the sum justly due on account of said receiver's certificates, but that they are advised and believe that the plaintiff is not entitled to receive payment thereof; that when the said property came into the hands of these defendants, it was subject to a lien for the amount actually due from the receiver and his successor in the trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants when they acquired the property succeeded to all the rights of the prior owners of the property as well as to their obligations; that in accepting the deed of the premises, they intended only to obligate themselves to pay the amount actually due from the receiver on account of such certificates, with proper interest, and no other or greater sum by way of profit, and defendants aver that they incurred no greater or other obligations in the premises.

The defendant the New York, Rutland and Montreal Railway Company also put in a separate answer. It alleged, among other things, that defendants Foster and Hazard had conveyed and transferred to it all the property and franchises conveyed to them by the referee in the Sackett suit subject to the payment of the sum justly due by said receiver, but not subject to any greater sum, and it controverts the allegations as to the amounts due on the receiver's certificates.

The American Loan and Trust Company also answered separately, setting up that it was the holder of a mortgage executed to it by the New York, Rutland and Montreal Railway Company, and denying knowledge or information as to the matters charged in the bill.

The case came on for a hearing on pleadings and proofs, and after full argument, on March 24, 1887, a decree was passed of which the following is a copy (omitting the description of the property, which is the same as that contained in the complaint in *this* action):

"It was ordered, adjudged and decreed as follows:

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"That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2d day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000 of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent per annum thereon from the first day of January, 1886.

"That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said district, requiring the holders of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

"That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part

thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said district, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid, together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys, after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to

them respectively, as may be ascertained by said master as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution thereof; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

"And it is further ordered, adjudged and decreed that the defendants and all persons claiming under them, or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and thereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein.

[Description.]

"Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases."

Subsequently, in pursuance of the decree, the holders of the

certificates appeared before the special master and made proof of their ownership thereof, and said master, on February 7, 1888, made a report accordingly, finding the names of the holders thereof and the amounts due them respectively.

On March 23, 1892, in pursuance of an order of sale made by the said Circuit Court of the United States, Worthington Frothingham, as referee, sold the said premises and property described in the complaint (and described in the deed of George McClellan, referee, to Foster and Hazard) to William Foster, Jr., for the sum of seventy-five hundred dollars, and on April 25, 1892, executed and delivered a deed therefor to the said William Foster, Jr.

On December 8, 1890, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the will of W. H. Douglas, deceased, and Ida S. Harrison, for themselves and other holders and owners of bonds issued by the Lebanon Springs Company and the Harlem Extension Railroad Company, filed a petition or bill of complaint in the Supreme Court of New York against the Union Trust Company of New York, James C. Hull, William Butler Duncan, John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased; the New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as receiver of the property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston; the Massachusetts Mutual Life Insurance Company, and others.

In this petition there is a history of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and of the several legal proceedings whereby the roads, property and franchises of these companies became vested in the New York, Rutland and Montreal Railway Company, which is substantially the same with that heretofore made in this statement. But the petition assailed the action brought

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by Sackett in 1880, and which resulted in the sale to Foster and Hazard in 1885, as fraudulent and collusive, and alleged that "the suit by Sackett was brought and conducted, not with the intention of realizing the said property for the benefit of the bondholders or any of them, or of himself as bondholder, but collusively and with the intent that he and others should receive large sums of money from the said property under color of the payment of claims, which, even if valid, were subordinate to said mortgages, and with the intent that said railroad and property should be acquired by others free from the lien of said mortgages, and without realizing anything to the holders of said bonds."

The petition further alleged that "afterwards the defendant, the Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated at par of the principal of the same, brought an action in this court against the defendants Foster and Hazard, the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company; that in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates; that said action was removed into the Circuit Court of the United States, and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates."

The prayers for relief were as follows:

"1. That it may be adjudged that the owners of the bonds issued by the Lebanon Springs Railroad Company have a first lien upon the said railroad and property, and the owners of the bonds issued by the Harlem Extension Railroad Company a second lien thereon, in preference of all others. That the bond and mortgage executed by the defendants Hull and Lincoln to the defendant Duncan and the said Park is held for the benefit of the owners of said bonds and represents their interest solely, and that defendants Brown and Seligman redeliver the same.

"2. That the judgment in the action brought in this court

by the defendant the Union Trust Company, and the decrees in the two actions brought by that company in the Court of Chancery of Vermont, be now specifically enforced, and the mortgage by the said Hull and Lincoln be now foreclosed, and that the said railroad and property be sold under said judgments and decrees, and said mortgage of Hull and Lincoln, for the benefit of this plaintiff and all other of the owners of the Lebanon Springs and Harlem extension bonds, and that all of the defendants in this action be barred and foreclosed of all right, title, interest and equity of redemption, of, in and to the said railroad and property and any part of the same.

"3. That it may be adjudged that the certificates issued by the said Van Valkenburgh were beyond the power of this court to issue and are of no validity except to bind the interest represented by the eight bonds of the said Marvin Sackett, and the interests of the defendants in the action brought by said Sackett.

"4. That all of the defendants in this action and all other persons be enjoined, as well temporarily by order as permanently by judgment, from interfering with any part of the said railroad or property.

"5. That a receiver be appointed, with the usual powers of receivers, to take possession of, preserve and operate said railroad and property until further order of the court.

"6. That the plaintiffs have such other and further relief as to the court shall seem just, besides costs."

To this petition the Central National Bank of Boston filed its separate answer, in which, after admitting certain allegations in the petition, relative to the history of the railroad companies, the said defendant set forth the proceedings in the suit of Sackett, including the appointment of Van Valkenburgh as receiver, the authority given such receiver by the court to issue and negotiate the said certificates, and the purchase by the defendant of $250,000 of said certificates for full value. The answer further alleged, in response to the petition, that the suit was brought by Sackett for himself as bondholder and on behalf of all other bondholders; that other

bondholders, representing all, or nearly all, the bonds issued by the Lebanon Springs Railroad Company, had knowledge of the pendency of said suit by Sackett, and were represented by attorneys and counsel, although not nominally made parties to the action; that Foster and Hazard became purchasers at the sale, and that, by the terms of the sale, they had assumed the payment of the unpaid portion of said certificates as part of the consideration of the purchase; and further alleged that said judgment of the Supreme Court of New York had never been appealed from, reversed or in any way vacated or modified, and was binding and conclusive, not only upon the parties to said action, but upon the other holders of said bonds issued by the Lebanon Springs Railroad Company. The answer then proceeded to set forth proceedings in the Circuit Court of the United States, including the decree of March 24, 1887, and to pray, among other things, that the petition should be dismissed upon the merits, and that a decree may be rendered recognizing the rights of the defendant the Central National Bank of Boston as a holder of said certificates as such rights had been theretofore established by the decree of the Circuit Court of the United States.

The American Loan and Trust Company filed its separate answer, admitting some and denying other allegations of the petition. Hazard and Foster also filed a separate answer on their own behalf, in which they allege that the Sackett suit was brought and pursued in behalf of all the bondholders; that they, Foster and Hazard, had purchased the railroad property and franchises in good faith, and that by the judgment, decree and sale in said suit all the rights of said bondholders, plaintiffs in this suit, were cut off and barred, and that they, Foster and Hazard, had thereby acquired a good and valid title to said property and franchises, and thereupon they prayed that the complaint be dismissed and that a decree be rendered establishing their rights as purchasers of said road under said judgment and decree.

The New York, Rutland and Montreal Railway Company likewise filed a separate answer, denying the principal allegations of the petition, and praying that the rights of said com-

pany as purchaser of said road from Foster and Hazard should be confirmed, and that the complaint be dismissed.

Certain other individual defendants, holders of receiver's certificates, likewise answered, denying these allegations of the petition which assailed the validity of the proceedings in the Sackett suit, and praying that the said petition should be dismissed. Separate answers were likewise filed by Seligman and Brown, and by William B. Duncan substantially to the same effect.

Upon the first trial of this action judgment was rendered in favor of the defendants, dismissing it on the merits. On appeal that judgment was reversed by the general term and a new trial ordered. *Stevens* v. *Union Trust Co.*, 57 Hun, 498.

At the new trial judgment was rendered in favor of the plaintiffs on November 10, 1891, and this judgment, having been affirmed by the general term, was taken on appeal to the Court of Appeals, whose judgment, rendered November 27, 1894, affirmed that of the court below. *Stevens* v. *Central Nat. Bank*, 144 N. Y. 50. This writ of error was then sued out.

Upon sale made by John L. Henning, as referee, under the judgment of the Supreme Court in this case, pending the appeals, there was executed and delivered to said William Foster, Jr., by said referee a deed of conveyance of the railroad, property and franchises, dated May 16, 1892; and, as already stated, on March 23, 1892, the railroad was sold and conveyed to William Foster, Jr., by the referee appointed by the decree of the United States court.

After the judgment of November 10, 1891, William Foster, Jr., brought an action in the Supreme Court of New York against the Central National Bank and other holders of certificates, seeking to set aside that portion of the decree of the United States Circuit Court of March 24, 1887, which adjudged that Foster, either alone or with Hazard, pay the Central Bank and other certificate holders the deficiency that might exist in the payment of the certificates after the application of the proceeds of the sale of the road, and to annul and enjoin the decree that execution issue for such deficiency; and that this action, so brought by Foster, has been removed, on

the petition of the Central National Bank, to the Circuit Court of the United States for the Northern District of New York, where it is now pending.

Mr. Charles E. Patterson and *Mr. W. S. B. Hopkins* for plaintiffs in error. *Mr. Alpheus T. Bulkeley* was on *Mr. Patterson's* brief, and *Mr. William A. Sargent* was on *Mr. Hopkins'* brief. *Mr. Matthew Hale* and *Mr. Henry D. Hyde* filed a brief for plaintiffs in error.

Mr. Edward Winslow Paige for defendants in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

The plaintiffs in error ask us to reverse the decree of the Court of Appeals, affirming that of the Supreme Court of New York, because the action of Stevens and others as a bill of review, or a bill in the nature of a bill of review, was not brought within the time limited by the practice of the courts for entertaining such bills; that, under the Code of Civil Procedure of the State of New York, bills for review have no place for errors appearing upon the face of the record; that the only remedy for such errors is by appeal; that, in so far as it is contended that the decree in the *Sackett case* was obtained by a fraudulent assertion or suppression of facts, the party aggrieved must move promptly upon the discovery of the fraud or of new facts; that the bill and the evidence adduced to sustain it do not disclose such a case of fraud or of newly discovered evidence, but do show a case free from actual fraud, and only, at the most, irregular by reason of a failure to include all the proper parties; that the parties complainant are to be visited with a knowledge of the proceedings in the Sackett suit by reason of the protracted and notorious character of the proceedings, and because knowledge of the proceedings in the Sackett suit must further be imputed to them, because they are represented in the effort to impugn the validity of that decree by counsel who had appeared for Sackett in his suit; and that hence the present suit should, on the well-estab-

lished rules regulating bills of review and bills to impeach decrees on the ground of after-discovered evidence, have been dismissed.

Without expressing any opinion on such allegations of error, it is sufficient to say that they raised questions for the consideration of the Court of Appeals of the State of New York, and that the disposition made of them by that court is binding upon us.

But those assignments of error which allege that the judgment of the Supreme Court of the State of New York, and of the Court of Appeals in affirming it erred in failing to give proper effect to the decree of the Circuit Court of the United States, and in granting a final injunction restraining the appellants from availing themselves of the provisions of such decree, certainly do present questions which are within our jurisdiction to consider.

Referring to the previous somewhat extended statement of the facts, we may briefly recapitulate a few of the principal dates. In August, 1880, Marvin Sackett brought his suit in the Supreme Court of the State of New York, on behalf of himself and all other holders and owners of bonds of certain railroad companies against Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company and David Butterfield, receiver of said company, praying for the appointment of a receiver and for a sale of the railroad and franchises for the benefit of the bondholders. On October 11, 1880, a receiver was appointed and qualified.

On April 2, 1881, on petition of the receiver, and after a report by an expert disclosing the necessity for expenditure to make the road safe and to enable trains to be run, an order was made by the court authorizing the receiver to issue and negotiate $350,000 in certificates, the same to be a first lien. The certificates were sold, and the proceeds expended under the approval of the court. On June 12, 1885, sale was made of the road and deed delivered to Foster and Hazard for $155,000, subject to the payment of the unpaid portion of the principal and interest of the certificates.

Opinion of the Court.

On April 9, 1886, the Central National Bank of Boston brought suit in the Supreme Court of New York, on its own behalf and that of others as owners of the certificates, against Foster, Hazard, the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company. On March 24, 1887, the suit having been transferred on the petition of the defendants to the Circuit Court of the United States, after full hearing and argument the latter court rendered a final decree, establishing the rights of the Central National Bank of Boston and of others as owners of said certificates, declaring the latter to be a first lien, decreeing that Foster and Hazard were liable for any deficiency if sale should fail to realize enough to pay certificates. On March 23, 1892, sale under said decree to Foster for $7500, and on April 25, 1892, deed of conveyance by referee to Foster. On December 8, 1890, Stevens and others brought their suit in the Supreme Court of New York against the Central National Bank of Boston, the other holders of certificates, Foster, Hazard and others, to set aside decree in case of Sackett and to enjoin proceedings in the Circuit Court of the United States. On November 11, 1891, judgment setting aside sale in the case of Sackett and finally enjoining the Central National Bank of Boston and others, plaintiffs in the Circuit Court of the United States, from selling under the decree of the Federal court.

On May 16, 1892, sale and conveyance were made by referee under the decree in the present suit to Foster. On May 9, 1893, judgment of the general term, and November 27, 1894, judgment of the Court of Appeals was rendered, affirming the judgment of the Supreme Court.

It will be perceived, on an inspection of these dates, that when the present suit was brought a final judgment had been rendered in the Circuit Court of the United States, establishing the title and rights of the holders of the certificates, directing a sale by a referee, and adjudging the personal liability of Foster and Hazard for an unpaid portion of said certificates after the application of the proceeds of sale; that when the judgment of the Supreme Court was entered in the present

case, and without awaiting the result of the appeal to the Court of Appeals, a sale was had in which Foster became the purchaser on a bid of $7500; and that Foster was likewise the purchaser at the sale on the decree of the Circuit Court.

The record does not disclose what application was made of the purchase money paid by Foster on his respective purchases at the two sales, but it may be easily conjectured that, after the payment of the costs and of the expenses of the sales, little or nothing would be left applicable to the bonds and certificates. Thus the singular result, thus far reached, of this protracted and expensive litigation, is that Foster, who had with Hazard been the purchaser at the Sackett sale, has become the owner of the railroad upon the payment of a merely nominal sum, and that the bondholders and the owners of the certificates have realized nothing. And it further thus appears that ever since May 16, 1892, the controversy has really been between the holders of the receiver's certificates and Foster who has, for a trifling sum, become the owner of the railroad as improved by money procured by the sale of the certificates.

It may be that Foster, when he bought under the decree of sale in the present suit, did so in pursuance of some arrangement with the bondholders and as their trustee. But whether Foster, when he bought under the decree of the Circuit Court of the United States, subjected himself to that feature of the decree that made him personally liable for the unpaid portion of the certificates, and precluded himself from relying on the decree of the Supreme Court of New York setting aside the Sackett sale, and whether the setting aside the sale in the Sackett suit would invalidate receiver's certificates issued years before and whose proceeds had gone into the improvement of the property, and whether, in case of Foster's inability to respond to his personal obligation, the unpaid portion of the certificates would be a lien on the railroad in his hands and those of his vendees, are questions for the Circuit Court of the United States, which cannot be withdrawn from its determination by the subsequent proceedings in the Supreme Court of New York. Any confusion that might otherwise have arisen by reason of conflicting views between the Federal and state

courts has been prevented by the fact that Foster, who himself originally invoked the jurisdiction of the Circuit Court of the United States, has become the purchaser of the railroad under the decrees of both courts, whereby the only substantial controversy that remains is between him, as such purchaser, and the holders of the certificates.

Those portions of the decree of the Supreme Court of New York and of the Court of Appeals which sought to compel the complainants in the suit pending in the Circuit Court of the United States to come into the state court and to there relitigate their titles to the certificates and the amounts thereof, and which sought to restrain them by injunction from proceeding under the final decree of sale of the Circuit Court, and from enforcing the other remedies adjudged to them by that decree, were, in our opinion, erroneous. Due effect was not thereby given to the judgment or decree of the Circuit Court, at least in so far as that decree had established the ownership and amounts of the certificates, and the injunction was a plain interference with the proceedings in another court which had full and complete jurisdiction over the parties and the subject-matter of the suit, and which jurisdiction had attached long before the suit in the Supreme Court had been begun.

It will suffice to cite a few of the cases:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely em-

barrassing to the administration of justice. In the case of *Kennedy* v. *The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." *Peck* v. *Jenness*, per Mr. Justice Grier, 7 How. 612, 624.

"State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the Circuit Courts. Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action Circuit Courts are wholly independent of the state tribunals." *Riggs* v. *Johnson County*, 6 Wall. 166.

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court, on a writ of error to the Supreme Court of the State. *Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141.

The exemption of the authority of the courts of the United

States from interference by legislative or judicial action of the States is essential to their independence and efficiency. *Freeman v. Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Rio Grande Railroad* v. *Gomila*, 132 U. S. 478.

In Story's Equity Jurisprudence, vol. 2, § 900, it is said, referring to the power sometimes exercised by courts of equity, to restrain parties within their jurisdiction from proceeding in foreign courts: "There is one exception to this doctrine which has been long recognized in America, and that is, that state courts cannot enjoin proceedings in the courts of the United States; nor the latter in the former courts."

It is contended by the counsel for the defendants in error, in a supplemental brief that these principles, so long and so well settled, have been modified by some recent decisions of this court and the case of *Moran* v. *Sturges*, 154 U. S. 256, and of *Shields* v. *Coleman*, 157 U. S. 168, are cited in support of that contention. Such a conception of the import of those cases must have been formed from a hasty reading, for they are in perfect harmony with the previous cases, and, indeed, may properly be cited to sustain the reasoning upon which those cases proceeded.

In *Moran* v. *Sturges*, the Chief Justice, delivering the opinion of the court, cited the cases hereinbefore referred to and others, and stated the general rule to be that state courts cannot enjoin proceedings in the courts of the United States. In that case the Supreme Court of the State of New York had issued process against certain libellants in the District Court of the United States, and had, after hearing, enjoined them from taking any further proceedings on their libels. This judgment of the Supreme Court being affirmed by the Court of Appeals, and the judgment of the latter court being remitted to the Supreme Court and entered there as its judgment, the libellants sued out a writ of error to this court, and it was here held that the state court had no jurisdiction *in personam* over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was one for the District Court to decide in the first instance; that the District Court had jurisdiction; and that the judgment under

review was in effect an unlawful interference with the proceedings in that court.

It is true, as the report of the case shows, that two of the judges dissented, but not because of any disapproval of the principles laid down by the court, but because it was thought that the possession of the vessels in question had vested in the state court before the libels were filed in the District Court.

In *Shields* v. *Coleman* there was a controversy for possession of certain railroad property, and it was held that a Circuit Court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court. Such a decision, it is scarcely necessary to say, gives no support to the contention of the appellees.

The reasoning of the Court of Appeals, affirming the judgment of the Supreme Court of New York, does not seem to us to comport with the law as established by the decisions of this court. It is claimed by the learned judge, who delivered the opinion of that court, that the rule is that "although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties and direct them, by injunction, to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities and enforce obedience to their decrees by process *in personam*."

This language is quoted from Story's Eq. Jur. § 899; but

the learned judge overlooked the passage immediately following, and hereinbefore quoted: "There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein." Nor did the decision of this court in *Peck* v. *Jenness*, already cited, receive attention, wherein it was said, after adverting to the proposed distinction between enjoining a court and enjoining suitors therein, "The fact that an injunction issues only to the parties before the court and not to the court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Nor are we able to acquiesce in the reasoning of the learned judge when he says that "the setting aside of the judgment in the Sackett suit upon which the suit in the United States Circuit Court was founded, for fraud, was a *new fact*, occurring since the decree in that court, which gave jurisdiction in this action to enjoin proceedings thereon." Doubtless there may be facts occurring after the rendition of a judgment which would render its enforcement inequitable; such, for instance, as payment, or a reversal thereof on appeal by a superior court. But surely a judgment and injunction rendered subsequently in another and independent forum cannot constitute such new facts unless we are prepared to concede that, as between two courts of concurrent jurisdiction, it is the judgment of the court whose jurisdiction is *last* invoked which shall be entitled to prevail. This view does not overlook the decision of this court in *Marshall* v. *Holmes*, 141 U. S. 589, where it was held that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a Federal court if the judgment had been rendered

by it and not by a state court. There the suit to restrain the owner of the judgment from enforcing it was brought in the state court that had rendered the judgment, and was removed into the Federal court on the ground of diverse citizenship, and it was sought to impeach the judgment for the fraud of the party who procured it. In the present case, no fraud of any kind is imputed to the plaintiffs in the Circuit Court of the United States, nor is it alleged that the action or proceedings in that court were founded in any mistake of facts, or were influenced by any misrepresentation or fraud practised upon the court. But the purpose of this suit was to practically nullify the proceedings in the Circuit Court, and to enjoin the suitors therein from pursuing their remedy in that court, not for any fraud of theirs used in promoting their cause, but for the alleged fraud of other parties in another court, and in a case in which these appellants were not parties.

It is claimed in the brief for the defendants in error that whatever may be the rule in ordinary cases there is no necessity in the present case for modifying the decree of the state court, and we are pointed to the statement in the opinion of the Court of Appeals, that "there is nothing in the judgment at bar that attacks the jurisdiction of the United States Circuit Court or questions the legality of its decree." We must suppose this language to mean that to enjoin the plaintiffs from proceeding to enforce the decree did not affect the legality or efficacy of the decree. Such must have been the meaning of the learned judge, because he proceeds to assert that "it is clear, both upon principle and authority, that this power [to enjoin the certificate holders] did exist, and that the sale under the decree of the United States court was without force or effect as to the parties to that suit, as they proceeded in violation of the injunction contained in the judgment at bar."

But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. Thus it was said in *Riggs* v. *Johnson County*, 6 Wall. 166, that "process subsequent to judgment, is as essen-

tial to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." And in *Amy* v. *Supervisors*, 11 Wall, 136, it was said: "The two sets of tribunals — state and national — are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgment and decrees."

"An execution is the end of the law. It gives the successful party the fruits of his judgment." *United States* v. *Nourse*, 9 Pet. 8, 28. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. "*Juris effectus in executione consistit.*" Co. Litt. 289.

The conclusions we have reached are that the judgment of the Supreme Court of New York and of the Court of Appeals affirming the same are erroneous in so far as they command the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company and other holders of the receiver's certificates whose rights, as such holders, were adjudged by the Circuit Court of the United States, to appear before the referee appointed by the Supreme Court in the present case, and which enjoin the Central National Bank of Boston and others, whose rights have been adjudged by the Circuit Court of the United States for the Northern District of New York, from proceeding with the sale under the decree of that court.

The judgments of the Supreme Court of New York and of the Court of Appeals, in these particulars, are accordingly reversed, and the cause is remanded to that court for further proceedings not inconsistent with the opinion of this court.

MR. JUSTICE PECKHAM dissented.